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TABLE OF DECISION NUMBERS

	Page
B–163084, June 27	754
B–183012, June 29	761
B–183903, June 22	732
B–186858, June 13	694
B–187375, June 24	745
B–187395, June 8	675
B–187435, June 2	663
B–187587, June 20	725
B–187645, June 15	712
B–187683, June 23	740
B–187687, June 14	709
B–187872, June 3	668
B–188275, June 9	689
B–188444, June 17	721
B–188455, June 28	757
B–188533, June 24	750
B–188611, June 6	671
B–188665, June 22	737
B–188959, June 20	730

Cite Decisions as 56 Comp. Gen.—.

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[B-187435]

Contracts—Negotiation—Competition—Incumbent Contractor—Competitive Advantage

Prior decision, holding that erroneous estimate contained in request for proposals (RFP) misled offerors other than incumbent, is affirmed on reconsideration as arguments presented by incumbent do not alter prior determination that cost impact of erroneous estimate could not be predicted without reopening of negotiations.

Contracts—Negotiation—Competition—Indefinite, etc., Specifications

Finding that RFP did not contain accurate estimate of file size will not have adverse effect on use of estimates in future procurements as alleged in request for reconsideration, as original decision did not hold that estimates must be precisely accurate but only that they be based on best information available to Government.

General Accounting Office—Recommendations—Contracts—Prior Recommendation—Modified—Changed Requirements

Prior recommendation in 56 Comp. Gen. 402 that negotiations be reopened because of impossibility of ascertaining price impact of misleading Government estimate is modified to permit agency to not exercise option under current contract and to resolicit offers under new solicitation because of changed Government requirements since issuance of original decision.

Contracts—Specifications—Adequacy—Negotiated Procurement

While it is alleged that requirement for standardization of encoding scheme for data base to that developed by contractor under questionable award will effectively preclude potential offerors other than incumbent from competing, such requirement is not unduly restrictive where, as here, need for standardization has been demonstrated as legitimate.

In the matter of Informatics, Inc., Reconsideration, June 2, 1977:

International Computaprint Corporation (ICC) has requested reconsideration of our decision in the matter of *Informatics, Inc.*, 56 Comp. Gen. 402 (1977), 77-1 CPD 190.

Our decision of March 15 found that request for proposals (RFP) No. 6-36995 issued by the Department of Commerce was defective and recommended that negotiations be reopened and another round of best and final offers be requested. The RFP was for the preparation of patent data for patent full text data bases for the Patent and Trademark Office. The RFP advised offerors that at the beginning of the contract year, the contractor might be required to receive and implement from the incumbent contractor an existing suspense file which may not exceed 20,000 Series 4 patent applications. Upon our review of the record, we found that the size of the suspense file decreased steadily over a 3-year period (July 1973 to July 1976), and at the time the RFP was issued the file contained no Series 4 applications

and 1,247 Trial Voluntary Protest Program (TVPP) files. While there was a dispute among the parties as to whether the TVPP files were properly included in the suspense file, we found it unnecessary to resolve the dispute because of the wide discrepancy between 1,247 files and the 20,000-file estimate contained in the RFP.

We found that Commerce could have more accurately predicted the size of the suspense file a new contractor would have to receive at the beginning of the contract year and that the failure to include a more realistic estimate operated to the competitive disadvantage of all offerors other than the incumbent, ICC.

Regarding the cost impact caused by the above-noted deficiency, we made the following observation in our March 15 decision:

> There is a dispute in the record as to the cost impact on Informatics' proposal caused by the failure to state the actual number of files in the suspense file or a more realistic estimate. Commerce states the cost impact would be less than the difference in the Informatics and ICC proposals and Informatics alleges that it allowed costs in its proposal which greatly exceeded this difference. We do not believe it is necessary to determine this amount exactly. Due to the closeness of the two proposals (Informatics—$10,891,829.60; ICC- $10,883,166.59), we find a reopening of negotiations to permit another round of best and final offers the only real means to determine the amount of such a cost impact. * * *

ICC's request for reconsideration is initially grounded on the allegation that the erroneous estimate did not affect Informatics' price proposal because the cost difference is minimal between receiving 1,200 files and 20,000 files. ICC contends that the most expensive operation involved in the receipt of the incumbent's suspense file is the development of a software conversion program which would have to be developed for a file of any substantial size. The only difference between receiving 1,200 files and 20,000 files would be computer time and the additional reels of computer tape needed to store the additional files.

Informatics, in its comments in connection with the original protest, stated that if it had known the suspense file contained only 1,000 files it would not have based its costs upon using a software conversion program but would have based its costs upon rekeyboarding the files, which would be less expensive.

As noted in our decision, the work to be performed in connection with the receipt of the suspense file was not an individually priced item, but had to be absorbed by an offeror as an item of overhead. This factor, plus the closeness of the offered prices and the dispute among the parties as to the cost impact, resulted in our concluding that a reopening of negotiations was the only manner in which to assure equal competition. For these reasons, we remain of the same opinion.

Additionally, ICC argues that the conversion of the existing suspense file from the Version II format, the format in which it would be made available to the new contractor, to another format was not required under the RFP but was optional with the contractor. While

this statement is true, our Office was advised during the initial protest that the Version II format was not a feasible format in which to store the suspense files because of the difficulty in adding and removing files during contract performance. Therefore, while the conversion was not required by the terms of the RFP, practical considerations required such a conversion.

ICC further argues that our decision will have an adverse effect on future procurements where Government estimates normally would be required. Also, ICC points out that other variables of work under the contract did not contain an estimate and this could work to the disadvantage of an incumbent since potential offerors could underestimate the work and submit unrealistically low bids.

Contrary to ICC's fear that procuring agencies will be hesitant to include estimates in future procurements because the estimates may not be precisely accurate, this was not the import of our decision. We found that Commerce had employed the same estimate, 20,000 files, over a 3-year period, when it had data in its possession which showed this figure was no longer accurate. Our Office has long held that Government estimates must be based on the best information available. 37 Comp. Gen. 688 (1958). Therefore, Government agencies need only be concerned that any estimates used are based upon the best information available.

Concerning the failure of Commerce to include estimates for other portions of the work (i.e., code counts), Commerce noted in the RFP that the code counts could vary widely from issue to issue based on the length of individual patents and therefore only included an estimate of the number of patents in each issue. We find nothing improper in this because, unlike the available suspense file data, it was impossible to give a reasonable estimate of the code counts.

Finally, ICC contends that our suggested remedy, the reopening of negotiations, is improper and unfair. ICC argues that the reopening of negotiations will constitute an "auction" which our Office has considered unacceptable in the past and, further, that Informatics, through the original protest, has seen ICC's line item best and final offer while ICC has only seen Informatics' total offered price.

For the following reason, we do not find it necessary to respond to these contentions, except to note that we have been advised that Informatics has made available to ICC its line item best and final offer and, therefore, it appears that both parties have the same knowledge regarding the other's proposal.

While the request for reconsideration by ICC was pending, Commerce advised our Office that it did not believe strict conformance with our recommendation (i.e., reopening negotiations) was in the best interest of the Government because of changes in the Government's

requirements since the award of the contract to ICC. In its letter to our Office of April 20, 1977, Commerce noted the following changes:

1. A downward revision in the minimum annual amount of patent work that is guaranteed to the contractor. The minimum in contract 7-36977 was set at 60,000 patents per 52 week period when the Patent and Trademark Office was issuing between 70 and 80 thousand patents per year. Presently, the actual volume has fallen below the 70,000 level, with the Fiscal Year 1978 production expected to be below 60,000. In order to reflect the current work volume requirements a new solicitation will have a minimum guaranteed work level of 58,000 utility patents for each 52 week period in the initial year and the option year.

2. All prior solicitations and contracts required magnetic tape input to the Government Printing Office (GPO) 1010 Linotron. By letter dated March 29, 1977 the Government Printing Office informed the Patent and Trademark Office (P & TMO) that the Videocomp 500 photocomposer is to be used for the patent photocomposition requirement.

The Videocomp, by virtue of its design, is an inherently more flexible machine than the Linotron. More importantly it is less expensive and its use provides a substantial savings to the Patent & Trademark Office in Government Printing Office billings.

Therefore, a new solicitation would require that these input tapes be delivered for use with the GPO Videocomp 500 photocomposer instead of the Linotron 7010 photocomposer.

As it is estimated that this change will effect a substantial savings by the end of Fiscal Year 1977, the Department of Commerce intends to amend the present contract to require input to the Videocomp at the earliest possible time.

3. Prior to the development of the specifications for the 1975 and 1976 solicitations, the data base coding for equations and chemical diagrams had not been established. Solicitation No. 6-36995 permitted prospective contractors to submit their own encoding scheme for complex work units (CWU). The Government reserved the right to select or reject any proposed scheme in order to ensure compatibility with the existing encoding for the Data Base file. The encoding scheme proposed by ICC was workable in all respects and was accepted for use in the Patent Data Base File. All Patent Data Base tapes delivered by ICC under contract No. 7-36977 since the December 7, 1976 issue contain the currently accepted coding scheme.

Consequently, the new solicitation would provide all offerors a comprehensive data base coding technique which is capable of capturing almost all complex work encountered in contract performance.

Because of these changes, Commerce proposes to resolicit offers for an initial period of 1 year with a 1-year option and not to exercise the option under ICC's current contract.

Informatics, in response to Commerce's suggested alternative, contends that the first two changes in the Government's requirements (the decrease in the annual amount of patent work and the change from the Linotron to the Videocomp 500) are minor changes which could be handled by an amendment to the RFP. Regarding the third changed requirement, the use of ICC's encoding scheme, Informatics argues that such a requirement would "lock-in" ICC because of the restrictive nature of the proposed specification.

Concerning the first two proposed changes in the Government's requirements, while affecting the final quantity or form of the product furnished the Government, we do not believe they are so significant that the RFP could not be amended to reflect these changes and negotiations reopened.

However, when viewed concurrently with the third change, we believe the suggested alternative of the Commerce Department is reasonable and would have no objection to its implementation.

In connection with the use of ICC's encoding scheme for complex work units, Informatics' contention that it is restrictive of competition is based on the argument that the furnishing by Commerce of the encoding scheme is useless to another offeror unless the associated photocomposition computer software is also furnished. Informatics states it has developed at considerable expense its own encoding scheme in connection with prior solicitations and such scheme wil be rendered useless if ICC's encoding scheme becomes the standard for all future procurements by the Commerce Department.

Commerce states that the need for standardization to one encoding scheme for complex work units was recognized by the Department when it issued the RFP under protest here. The RFP provided that "awardee(s) of contract(s) will be required to standardize Data Base Notations to the extent that the Goverment will obtain full Data Base tape file compatibility as a result of any award(s) under this solicitation." Commerce estimates that at the time the current 1-year contract with ICC expires in October 1977, there will be 16,000 patents containing ICC's encoding scheme in the Data Base.

While Informatics states that the development of the software to implement ICC's encoding scheme will involve considerable time and cost and will effectively preclude other offerors from competing, we believe Commerce has justified its requirement for standardization of the encoding scheme. The fact that one or more potential offerors may be precluded from competing because of the specification terms does not render the specification unduly restrictive of competition, if it represents the legitimate needs of the Government. 45 Comp. Gen. 365 (1965); *Holt Brothers-Energy Division*, B–184141, September 18, 1975, 75–2 CPD 163. Here, without standardization, the Government would have to recode the 16,000 patents which will have been prepared by ICC or be faced with having two different encoding schemes in its Data Base file.

Informatics states that to allow ICC to gain this competitive advantage is unfair because of the doubt raised by our decision of March 15, 1977, that the award to ICC was proper. While we did find that the results of the procurement were questionable, it is not practicable to ignore almost 1 year's performance under the contract and attempt to reconstruct the circumstances and facts as they existed at the date of the award to ICC.

Accordingly, ICC's request for reconsideration is denied; however, our Office has no objection to the implementation of Commerce's proposed resolicitation.

This decision in no way affects the Department of Commerce's obligation to explain the actions taken under this procurement pursuant to the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176, as required by our decision 56 Comp. Gen. 402, *supra*.

[B-187872]

Contracts—Protests—Timeliness—Significant Issue Exception—Evaluation Formula

Government's formula for evaluating bids which does not reflect anticipated requirements raises significant issue notwithstanding agency's view that protest is untimely.

Bids—Evaluation—Method of Evaluation—Lowest Bid Not Lowest Cost

Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria.

In the matter of Southeastern Services, Inc., and Worldwide Services, Inc., June 3, 1977:

Southeastern Services, Inc. and Worldwide Services, Inc. protest award to Dyneteria, Inc., under Department of the Air Force (Air Force) invitation for bids F41612-77-09001 for food services required at Sheppard Air Force Base.

Both protesters complain that the evaluation formula included in the solicitation permitted Dyneteria to use the formula to gain an unfair advantage. Moreover, it is argued that Dyneteria and the next low bidder should have been rejected in accordance with the provision in the solicitation for rejection of unbalanced bids.

The solicitation envisioned award of a 1-year contract, with two annual renewal options and provided for evaluation of the option periods. It contained estimates of the Government's expected meal requirements for each month over the entire 3-year period. Bidders were required to submit a separate fixed price for each month reflecting estimated monthly requirements stated in the solicitation. The contractor is required to provide at its base price any number of meals falling within a range of 90 to 110 percent of the appropriate monthly meal estimate. The invitation also required that bidders submit a bid price to be subtracted from its base price for each unserved meal, should the total number of meals served in any month

be less than 90 percent of that month's meal estimate. Similarly, an additive bid price for any meal served in excess of 110 percent of the monthly estimate was required. Finally, the parties would agree to negotiate a new price, irrespective of the base prices and additive or deductive factors, for any month for which meal requirements varied from the estimate by more than 20 percent.

The 3-year total of Dyneteria's base prices amounted to $6,806,819.70. Southeastern's total base prices for the same services amounted to $6,793,843.75. The bid evaluation criteria, however, require that both the additive and deductive bid factors be multiplied by 20 percent of the annual total of the monthly meal estimate and that they be added and subtracted from the base price, respectively. This provision was included in accordance with Air Force Armed Services Procurement Regulation (ASPR) Supplement § 7–1950, Basis of Payment (Food Services) (Mess Attendant Contracts) (Amend. June 17, 1976). Southeastern's price remained unchanged, when evaluated, because its bid adjustments were equal and canceled each other. Dyneteria's deductive factor was much greater than its additive factor, resulting in a lower evaluated price.

While the parties have focused on a number of issues, including alleged unbalancing of Dyneteria's bid, we believe the primary and most significant underlying issue for consideration concerns the reasonableness of the Government's bid evaluation formula. Even if Dyneteria's bid were unbalanced, it would not be objectionable unless the Government's formula for evaluating bids does not reflect its anticipated requirements. While the Air Force contends this issue should have been raised prior to rather than after bid opening and therefore is untimely under our procedures (4 C.F.R. 20.2(b)(1) (1977)), the use of defective evaluation criteria prevents the Government from obtaining full and free competition for its actual needs and, in our opinion, raises an issue significant to procurement practices. Therefore, the matter is for consideration pursuant to the exception provided in our timeliness rules concerning consideration of significant issues. 4 C.F.R. 20.2(c).

It is obvious that the use of a 20 percent factor for evaluating both the deductive and additive factors bears no relationship whatever to its intended application. By the terms of the solicitation, only one factor, either additive or deductive, could apply during any particular month, and at most, the two factors could be applied to only 10 percent of the total number of meals required. The standard solicitation provisions set out in the Air Force supplement to the ASPR specifically recognize that the 20 percent factor is included for evaluation purposes only and is not an estimated requirement.

Moreover, it is apparent that the 20 percent factor is far out of line with the actual meal experience at Sheppard AFB. The record shows that between October 1974 and September 1976, that is for 24 months, the meals actually served amounted to less than 90 percent of the monthly meal estimate in only three months and in only one month did meals exceed 110 percent of the estimate. In those four instances, the number of meals served was outside the 90 to 110 percent range by 6 percent, or less. Indeed, the Air Force contends the accuracy of its estimates is improving and it has revised the 20 percent evaluation factor downward to 10 percent for future procurements.

It is patently clear that this method of evaluation gives no assurance that award would be made to the bidder offering the lowest cost to the Government, even if none of the bidders submitted unbalanced bids. Our Office has held that the lowest bidder must be measured by the total and actual work to be awarded. Any measure which incorporates more or less than the work to be contracted in selecting the lowest bidder does not obtain the benefits of full and free competition required by the procurement statutes. *See Chemical Technology, Inc.*, B-187940, February 22, 1977, 77-1 CPD 126 and cases cited therein. If, as here, a solicitation is structured so as to encourage unbalanced bidding, it is defective, *per se*, and no bid can be properly evaluated because there is insufficient assurance that any award will result in the lowest cost to the Government. *Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 CPD 164. Revised evaluation criteria may not be used after bid opening to justify award, because bidders have not competed on that basis.

Accordingly, we recommend that the Air Force resolicit its requirements on the basis of evaluation criteria which reflect the Government's best estimate of its requirements and that the contract awarded to Dyneteria be terminated in the event the bids received upon resolicitation are more advantageous to the Government than Dyneteria's contract prices, as determined under the revised criteria. As noted above, the Air Force has revised its evaluation formula by reducing from 20 percent to 10 percent the number of meals to which the additive and deductive factors are applied. However, a 10 percent figure is objectionable because it, too, bears no relation to the Government's anticipated requirements. We suggest that in view of the reported improved estimates there no longer may be a need for requiring bidders to furnish additive and deductive prices for meals outside the range for which base prices are required. In the event the Air Force continues to require additive and deductive prices, we believe it would be simpler if the Government imposed predetermined adjustment rates for quantities not covered by the base price. Such adjustments should

give due regard to economies of scale. In this way, whatever contingency factor bidders may include in their bids to cover the possibility of variations in quantity beyond the basic quantity range will be concentrated in the base price and can be readily evaluated. The solicitation also should provide the best available information regarding past and possible future variations from the estimated quantities.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

[B-188611]

Bids—Evaluation—Method of Evaluation—Lowest Bid Not Lowest Cost

Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended.

In the matter of Globe Air, Inc., June 6, 1977:

Globe Air, Inc. (Globe) protests the bid evaluation method and formula contained in invitation for bids (IFB) No. R4-77-15 issued by region 4 of the Forest Service, Department of Agriculture, for helicopter services. Globe is primarily concerned with item 1 of the IFB and the Forest Service has agreed to withhold award on item 1 until the protest is resolved, unless emergency conditions require an earlier award.

Item 1 stated the following requirements for the Indianola Base, Salmon National Forest, Salmon, Idaho:

A standard factory equipped helicopter with seating for six passengers and baggage (fire-fighting tools and equipment) and 1½ hours fuel capable of [hovering in ground effect] HIGE at 8,000' pressure altitude on an 80° day with an internal payload of 925 pounds, as determined according to standard Forest Service helicopter loading instructions * * *.

The IFB provided the following bid evaluation method and formula:

Bid Evaluation

Awards for each item will be based upon the calculated effectiveness of qualified equipment accomplishing aerial missions on a per mission mile basis, resulting in the lowest cost to the Government. For purposes of this evaluation

the equipment selected will be determined by using a formula based on a standard factory equipped helicopter operating with contract required equipment, with a 170 pound pilot, 1½ hours fuel, HIGE on takeoff on an 80° day at 8,000' pressure altitude with an internal payload of 555 pounds or 925 pounds, whichever is applicable.

Formula to be used:

$$\frac{\text{HOURLY FLIGHT RATE BID}}{\text{PUBLISHED AIRSPEED (M.P.H.)}} = \text{COST PER MISSION MILE}$$

Published airspeed is defined as the FAA approved cruise true airspeed or 90 percent of the approved V.N.E. true airspeed, whichever is less, at the calculated gross weight operating at the altitude and temperature specified above.

The Forest Service received six bids on item 1; the hourly flight rate bid of each and the corresponding cost per mission-mile derived from the evaluation formula follow:

Bidder	Helicopter Model	Airspeed	Hourly Flight Rate	Cost per Mission-Mile
Idaho Helicopters	Alluoette III-319B	113 MPH	$394	$3. 49
Inland Helicopters	Allouette III-316B	102 MPH	400	3. 92
Global Trans & Log	Allouette III-319B	113 MPH	655	5. 80
Globe Air, Inc	Sikorsky S-55T	71 MPH	415	5. 85
Kenai Air Service	Bell 205A-1	100 MPH	850	8. 50
Sky Choppers, Inc	Allouette III-316B	102 MPH	1, 240	12. 16

Globe contends that the application of the IFB's formula is violative of 41 U.S.C. § 253 (1970) because it may result in a greater total cost to the Government over the term of the contract than would have resulted by determining the low bidder based solely on the hourly flight rate bid. Globe provides the following example:

* * * Applying Region 4's formula to hypothetical hourly flight rates bid, if an Alouette III were bid at $500 per flight hour, and S-55T would not be awarded a contract unless it were bid at an hourly rate of $362 or less. Conversely, if an S-55T were bid at $500 per flight hours, an Alouette III would nevertheless be awarded the contract at any hourly flight rate up to $690 per flight hour. Expressed in terms of percentage, the S-55T has to bid at an hourly flight rate 28% less than the Alouette III to be successful, or the Alouette III can bid any hourly flight rate up to 38% higher than the S-55T and still be awarded the contract.

Globe refers to our decision in *Hughes Helicopters*, B-183649, September 17, 1975, 75-2 CPD 160, as controlling in this case. In that decision, region 4 of the Forest Service awarded contracts for helicopter services based on an evaluation of the cost required to perform a single initial attack mission—defined as the delivery of personnel and equipment to small fires in the shortest period of time after discovery—on each base rather than the total cost of the aircraft for the contract period. Hughes protested arguing that the cost per helitack mission was not the controlling cost criteria in view of the many other important factors that should be considered. Hughes showed that, although its cost per helitack mission was $18.29 higher than a competitor, award to that competitor would cost the Government at least $28,440 more for the contract period than award to Hughes based on

the guaranteed number of flight hours and Hughes' hourly flight rate bid—$158 lower than its competitor. The Forest Service in that case reported that improper calculations were made—inadvertently the effect of the high skid landing gear was overlooked—resulting in award for aircraft which did not meet specifications; however, due to the urgency of that fire season, termination would have resulted in complete disruption of fire plans. The Forest Service also advised that future procurements would consider the total cost of the aircraft for the contract period. Under these circumstances we believed that the awards should not be disturbed.

Here Globe argues that the cost per single helitack mission formula in *Hughes Helicopters* is functionally identical to the cost per mission-mile formula in the instant IFB and that neither considers the overall cost to the Government during the contract period. Globe concludes that the cost per mission-mile formula used here is invalid under the rationale of the *Hughes Helicopters* decision.

The Forest Service in response states that the instant formula was developed to comply with the *Hughes Helicopters* decision to assure that the valid minimum needs for helicopter services would be obtained at the lowest possible cost to the Government. The Forest Service explains that in the establishment of the bid evaluation formula speed was considered to be the best factor for scaling the performance data in the comparison of the different helicopters, because (1) speed is essential to the helitack mission, particularly the initial attack on fires, and (2) the speed relationships between helicopters are relatively consistent over a substantial range of operating conditions, while carrying the same required payload. The Forest Service also reasons that the flight time required is directly related to the speed capability of the helicopter—the faster the helicopter, the less the time to travel the same distance. Due to the nature of the missions flown and the typical loads required to be moved, any increase in load-carrying capability above that specified will not significantly affect the number of trips required during the contract period. However, a slower helicopter would require a greater number of flight hours to accomplish the same work, which would offset a potentially higher bid flight rate for a faster helicopter.

We note that by multiplying the cost per mission-mile by a constant (the average number of miles per mission), the result yields the cost per single helitack mission, previously admitted by the Forest Service in the *Hughes Helicopters* decision to be an improper evaluation formula. The formula is improper because it concerns only the helicopter's high-speed initial attack function, which based on the

Forest Service's past experience is expected to involve 25 percent of the contract time. The IFB indicates that the balance of the contract time is expected to be utilized with lower priority missions, such as "[t]ransportation of personnel, equipment, and supplies, scouting, patrol, or photography, work involving prolonged slow-flight, helitankers and fire missions, and administrative flying." The IFB's formula fails to consider the effect of these low-speed missions on the total cost to the Government; for example, if "A" bids $480 per flight hour and offers a helicopter with published airspeed of 120 miles per hour, and "B" bids $410 per flight hour and offers a helicopter with published airspeed of 100 miles per hour, the following would result:

Firm	Rate	Speed	Guaranteed Hours	Cost Per Mission-Mile	Total Cost
A	$480	120	200	$4.00	$96,000
B	410	100	200	4.10	82,000

Under the IFB's formula, which considers only the high-speed initial attack function estimated to involve 25 percent of the contract time, award would be made to "A" but the total Government cost would be $14,000 more than the cost of award to "B." Accordingly, the IFB's evaluation formula is improper because it fails to consider the effect on total Government cost of low-speed, lower-priority missions estimated to involve 75 percent of the contract time.

Globe contends that the low bidder should have been determined either by the hourly flight rate bid or by using a ton-mile per hour formula. The ton-mile per hour method was considered and rejected by the Forest Service. Our Office thoroughly considered the ton-mile per hour method in *T & G Aviation*, B-186096, June 21, 1976, 76-1 CPD 397, and we were not able to conclude that the ton-mile per hour method was the most cost effective method for evaluating this type of work.

Under the other method suggested by Glode to determine the low bidder--based on hourly flight rates bid—the low bidder was the same bidder that was the apparent low bidder using the cost per mission-mile formula. However, since bidders prepared their bids based on the IFB's invalid evaluation formula, and since the lowest three hourly flight rates bid on item 1—$394, $400 and $415---are so close, we find that the only acceptable means to determine the low bidder on item 1 based on hourly flight rate bid or any other valid evaluation method is to cancel item 1 of the IFB and resolicit for item 1 based on a proper evaluation method. See *Informatics, Inc.*, 56 Comp. Gen. 402 (1977), 77-1 CPD 190.

Protest sustained.

By letter of today to the Secretary of Agriculture, we recommend that in revising item 1 of the IFB, the Forest Service should consider establishing a reasonable minimum acceptable published air speed for helicopters. And in view of the IFB's stated beginning availability date of July 13, 1977, and the bidders general familiarity with the Government's requirements, the Forest Service should consider using an accelerated bidding schedule as authorized by Federal Procurement Regulations § 1-2.202-1(c) (1964 ed. amend. 85).

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congresssional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

[B-187395]

Contracts—Negotiation—Requests for Proposals—Specification Requirements—Off-Site and On-Site Testing

Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis.

Contracts—Negotiation—Offers or Proposals—Revisions—Equal Opportunity To All Offerors

Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest.

Contracts—Protests—Conflict in Statements of Contractor and Contracting Agency

Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and, based upon record, GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal.

Contracts—Negotiation—Offers or Proposals—Revisions—Cut-Off Date

Prior to discussions, agency's letter advised offerors of the opportunity to submit revised proposals after discussions. The same advice was repeated in oral discus-

sions. Agency failed to fully comply with Armed Services Procurement Regulation 3-805.3(d) (1976 ed.), because there was no subsequent written notification to offerors that discussions were closed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award.

Contracts—Negotiation—Requests for Proposals—Protests Under—Timeliness—Solicitation Improprieties

Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. 20.2(c) (1976).

Contracts—Protests—Procedures—Bid Protest Procedures—Improprieties and Timeliness

Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R. 20.2(c) (1976).

In the matter of Kappa Systems, Inc., June 8, 1977:

Kappa Systems, Inc. (Kappa), has protested against the award of a contract to Systems Consultants, Inc. (SCI), under request for proposals (RFP) No. F05604-76-09143, issued by the Department of the Air Force. The $125,655 contract is for operations analysis and computer programming support services for the Air Force's Ballistic Missile Early Warning System (BMEWS). Kappa seeks a termination for convenience of SCI's contract and a reopening of negotiations or a resolicitation.

Kappa contends (1) that the Air Force should have found SCI's proposal technically unacceptable; (2) that the Air Force failed to properly request best and final offers; (3) that the use of a firm-fixed-price, level of effort type contract was improper; and (4) that the RFP's statement of evaluation factors was deficient. The Air Force and SCI maintain that all of Kappa's contentions are without merit.

I. Acceptability of SCI Proposal

Kappa has contended at length that SCI's proposal was technically unacceptable. The main issue involves the requirement to test certain software modifications, and whether this would be done on-site (i.e., at BMEWS installations in Alaska and Greenland) or "lo-

cally" (i.e., off-site, in the vicinity of the procuring activity in Colorado).

Kappa essentially contends that the RFP required all verification testing to be done on-site; that SCI, in contravention of this requirement, proposed to do the testing locally; and that SCI's proposed method is technically impossible to carry out. The Air Force and SCI maintain that each of these arguments is without substance.

The RFP incorporated as mandatory requirements the provisions of Aerospace Defense Command (ADC) Manual 55-4, a publication which deals with management and control of ADC computer programs. Much of the controversy in this case involves two ADC forms included in the Manual which would be used by the contractor during contract performance. One is ADC Form 545, "MODIFICATION PERFORMANCE TEST/PLAN," which contains three signature blocks for Air Force use. The second is ADC Form 546, "MODIFICATION DISCREPANCY REPORT." At the risk of oversimplification, it can be stated that these forms essentially deal with the modifications tested by a contractor, the Air Force's approval of what was going on, and whatever problems were experienced in the testing.

Kappa initially points out that ADC Manual 55-4 required on-site testing. The protester contends that the following excerpts from sections 4.3.8 and 4.3.9 of SCI's proposal clearly indicate that all of SCI's testing would be done off-site, since the Air Force's sign-off on the ADC Forms 545 and 546 would occur prior to the time SCI went on-site:

> 4.3.8 *Software Production.* * * * SCI shall develop the Modification Performance Test Plan (ADC Form 545). A single ADC Form 545 shall be prepared for the combined Task #77-3 and #77-4 software modification.* * * *All software debugging and initial software verification shall be performed on the locally available Government HISI 6080 computer system.* Upon completion of the above effort, the ADC Form 545s shall be submitted to the Government *for approval.* As reflected in Figure 4-2, fifteen calendar days are provided for the Government approval of the individual ADC Form 545s.
>
> 4.3.9 *Software Testing.* * * * *Upon Government approval of the ADC Form 545, SCI shall conduct software testing locally.* SCI shall perform testing IAW the approved ADC Form 545, and shall provide all required support to the Government appointed test directors. Modification discrepancies identified during the test period shall be documented on the ADC Form 546. Modification Discrepancy Report. Upon *completion* of testing, the related ADC Forms 544/545/546 and *test results* and recommendations shall be submitted to the Government for approval. [Italic supplied.]

Kappa further argues that the following language from section 4.3.11 of the SCI proposal shows that SCI's on-site activities involve only installation and training, not testing:

> 4.3.11 *Software Implementation.* * * * SCI will perform on-site *installation* with the assistance as required from the Government. SCI shall additionally provide *training* to on-site personnel on modification impact and utilization procedures, and shall *brief* site personnel on operating procedures which reflect the software modification. One SCI Senior Programmer and one Senior Analyst shall travel to Site I and II for this effort. [Italic supplied.]

The protester maintains that its interpretation of the foregoing textual material is confirmed by a chronological flow chart (figure 4–2) contained in the SCI proposal. Figure 4–2 indicates submission of the ADC Forms 545 and 546 in its blocks 6, 7 and 10—prior to SCI's on-site activities reflected in block 13, which states:

PERFORM ON-SITE IMPLEMENTATION AND PROVIDE OPS TRAINING ON NEW PROCEDURES.

Also, Kappa suggests that SCI offered an inadequate amount of time—10 days—to perform even the limited on-site activities it proposed. Kappa notes that it, as a predecessor contractor with several years' experience in this work, offered 42 days of on-site time.

Finally, Kappa points out that the BMEWS operations programs are written in a special modified version of the computer language "FAP." The protester contends that there is no off-site capability in existence for adequately simulating, emulating or testing BMEWS software modifications.

The Air Force's February 15, 1977, supplementary report to our Office responded in detail to the protester's allegations. The Air Force's position can be briefly summarized as follows. First, SCI's proposal acknowledged and accepted the provisions of ADC Manual 55–4. The Air Force interpreted sections 4.3.8 and 4.3.9 of the SCI proposal to mean that after initial local testing, SCI would conduct operational testing on-site as required by ADC Manual 55–4.

The ADC Form 545 must be submitted prior to testing; the initial Air Force sign-off indicates only approval of the contractor's *test plan*. This is what SCI's proposal was interpreted as offering—not that final Air Force approval of the test results would be obtained before going on-site. Also, while submission of ADC Form 546 prior to going on-site is not in accordance with Kappa's past procedures, it is not prohibited by ADC Manual 55–4. ADC Form 546—which does not require Air Force approval—can be submitted at any stage in a two-step testing process, i.e., off-site testing and on-site testing. SCI's two-step testing approach is not in conflict with ADC Manual 55–4.

BMEWS modifications must be extensively tested on-site. SCI agreed to on-site "implementation," which is defined in the RFP as including on-site operational testing.

Final approval of the ADC Forms 545 and 546 cannot be based on local (off-site) simulation testing; however, SCI's proposal was interpreted as calling only for Air Force *test plan* approval during the off-site phase. Also, the FAP program can only be tested on-site in an operational environment; however, *a design concept* for a modification can be tested locally. This is what SCI proposed, and in fact Kappa itself indicated local testing of a boosting trajectory modification con-

cept in its technical proposal. For these reasons, SCI offered an acceptable testing and verification approach under ADC Manual 55–4.

Kappa did not respond to the foregoing report.

In addition, for the reasons which follow we see no basis for objection to the Air Force's position. Kappa has not pointed out any provision in the RFP, nor have we found any, which unequivocally required that all testing of whatever sort be performed on-site. A requirement important enough to call for rejection of a nonconforming proposal should be explicitly stated in the RFP (48 Comp. Gen. 314, 319 (1968)); the lack of such an explicit requirement in the present RFP is a persuasive indication that none was intended.

We see no basis to conclude that SCI was proposing to do all testing off-site. As noted above, SCI offered software "implementation." The RFP's Statement of Work (SOW) explicitly defined program implementation as involving the installation of computer software modifications including operational testing. Further, as the Air Force has pointed out, ADC Manual 55–4 requires on-site testing and SCI's proposal acknowledged and accepted this directive without exception. While Kappa suggests that SCI's bare acknowledgment of the ADC Manual 55–4 requirements cannot mean very much, we note that RFP section "D," paragraph 3.b.1 (quoted *infra*) indicated that a routine acknowledgment of technical requirements might be all that was expected of offerors.

In addition, as the Air Force and SCI point out, ADC Form 545 clearly provides for more than one "sign-off" by the Air Force. The fact that SCI's proposal contemplated submission of the ADC Form 545 and obtaining Air Force approval before going on-site would not in itself establish that SCI's proposal did not indicate an intent to conduct required operational on-site testing subject to ultimate Air Force approval of the results.

Even if statements in portions of the SCI proposal (such as sections 4.3.8, 4.3.9, *supra*) raised questions as to whether SCI was proposing only off-site testing, we believe that reading these statements together with the remainder of the proposal (i.e., reading the proposal as a whole) reasonably supports the interpretation of the proposal arrived at by the Air Force.

In view of the foregoing, the decisions cited by Kappa for the proposition that a protest should be sustained where the selected proposal fails to comply with a material RFP requirement (for example, *Computer Machinery Corporation*, 55 Comp. Gen. 1151 (1976), 76–1 CPD 358; affirmed *C3, Inc., et al.*, B–185592, August 5, 1976, 76–2 CPD 128) are not in point.

Lastly, Kappa's argument that it is technically impossible to satisfactorily conduct off-site testing is basically answered by the fact that

SCI did not propose to conduct all testing off-site. As the agency has pointed out, SCI's proposal was interpreted as offering a two-step testing procedure, with final operational testing on-site. The impossibility of this procedure is not established by Kappa's argument that there is no adequate off-site capability to test FAP modifications. As for the protester's argument concerning the amount of time SCI plans to spend on-site, Kappa has cited a number of decisions to the effect that our Office will object to the results of an agency's technical evaluation where they are clearly shown to be without a reasonable basis (for example, *Rantec Division, Emerson Electric Co.*, B-185764, June 4, 1976, 76-1 CPD 360). We do not think the fact that SCI offered substantially fewer on-site days than Kappa constitutes such a showing. The RFP apparently did not require a specific number of on-site days, and it may be worth noting in this regard that the RFP evaluation factors, quoted in part *infra*, indicated that the Air Force was seeking merely a basic level of technical adequacy.

II. Request for Best and Final Offers

Kappa also alleges that the Air Force violated ASPR § 3-805.3(d) (1976 ed.), which state:

> At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written "best and final" offers shall be established and all remaining participants so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include information to the effect that (i) discussions have been concluded, (ii) offerors are being given an opportunity to submit a "best and final" offer and (iii) if any such modification is submitted it must be received by the date and time specified, and is subject to the Late Proposals and Modifications of Proposals provision of the solicitation.

The record shows that after evaluation of the initial proposals, the contracting officer sent a letter to Kappa dated August 11, 1976, which stated in pertinent part:

> 1. The Technical Review Board has reviewed your proposal and found it to be technically acceptable.
> 2. Notwithstanding the technical adequacy of your proposal, we desire to meet with your firm to discuss certain aspects of your Price Proposal, specifically the following:
>
> a. Section I, Para 4, Page 1, Alternative Approach.
> b. Figure 2-1, Page 7, Assignments for Task 77-1.
>
> 3. We have scheduled this meeting to be held at 9:30 A.M., 17 August 1976 * * *.
> 4. Should your firm desire to submit a revised Price Proposal as a result of the discussion, adequate back-up data and revised DD Form 633 must be furnished. Any such proposal must be submitted by not later than 4:00 P.M., prevailing local time, 23 August 1976, subject to Paragraph 28, entitled LATE PROPOSALS, MODIFICATION OF PROPOSALS AND WITHDRAWAL OF PROPOSALS, in Section C of the Request for Proposal.
> 5. The Government may elect to award the contract without further discussion of proposals. Accordingly, any offer should provide the most favorable terms from a price and technical standpoint which can be submitted to the Government.

Letters sent at the same time to SCI and the third competing offeror were substantially identical insofar as notice of an opportunity to

submit a revised proposal. They were different in that they requested a response to the Air Force's technical comments and warned that failure to make an adequate response would result in the proposal being found "nonresponsive."

The August 17 meeting was held with Kappa as scheduled. The contracting officer has stated that at the meeting, Kappa was again advised that it could submit a revised proposal up to August 23, and that the Government might elect to make award without further discussion.

SCI and the third competing offeror submitted revised proposals. Kappa did not. The Air Force decided that the two revised proposals were technically acceptable. Award was then made to SCI, which had offered the lowest price. When Kappa protested, the contracting officer originally took the position that no written or oral discussions had been conducted since the meeting with the offerors were concerned only with "clarifications" of their proposals. The Air Force later revised this position and correctly pointed out that discussions were in fact conducted.

However, the Air Force maintains that the August 11 letter and the August 17 oral advice to Kappa satisfied the intent of ASPR § 3-805.3 (d), because Kappa was effectively put on notice that discussions were being concluded and that best and final offers were being requested. The agency cites *Nationwide Building Maintenance, Inc.*, B-186602, December 9, 1976, 76-2 CPD 474, for the proposition that failure to confirm a request for best and final offers in writing does not provide a basis for overturning an award.

Kappa contends that the plain language of the regulation was violated, since the Air Force never provided written notification on or after August 17, 1976, that discussions had been concluded and that "best and final" offers were being requested. In this regard, Kappa's president has submitted an affidavit stating that Kappa had completed preparation of an "alternative" proposal on August 13, 1976, and that this proposal offered a lower price than the SCI contract price.

II.A. Timeliness of Kappa's Objection

SCI contends that Kappa's objection is untimely. In this regard, Kappa's September 10, 1976, protest to our Office stated in pertinent part:

> In accordance with 4 CFR § 20.1 *et seq.*, Kappa * * * hereby protests the award of any contract * * * under Request for Proposals (RFP) No. FO56-04-76-09143 * * *.
>
> * * * * * * *
>
> In support of its protests, Kappa alleges that:
>
> (i) Upon information and belief, the Contracting Officer intends to award the Solicitation, using a firm fixed-price level of effort term contract. Use of this type

contract, under the circumstances of this Solicitation would be in violation of Section 3-404.7, ASPR.

(ii) Upon information and belief, the Contracting Officer intends to award a contract to an offeror whose offer is *not* that which is most advantageous to the Government. Such action would be in plain violation of Sections 3-101 and 3-801.1, ASPR.

Pursuant to 4 CFR, Section 20.2(c), Kappa will submit an additional statement in support of its protest for the reasons stated above, as well as others, in the immediate future.

Pursuant to section 20.2(d) of our Bid Protest Procedures (4 C.F.R. § 20, *et seq.* (1976)), our Office requested Kappa to provide an additional statement in support of its protest. In response, Kappa submitted a letter dated September 24, 1976, which was received by our Office September 28, 1976. The September 24 letter specifically contended that the contracting officer violated ASPR § 3-805.3 by failing to give written notice that best and final offers were requested.

SCI's contention is based on section 20.1(c), (d) of our Bid Protest Procedures, which state:

(c) The initial protest filed with the General Accounting Office shall (1) include the name and address of the protester, (2) identify the contracting activity and the number of the solicitation and/or contract, (3) *contain a statement of the grounds of protest*, and (4) specifically request a ruling by the Comptroller General. A copy of the protest shall also be filed concurrently with the contracting officer and the communication to the General Accounting Office should so indicate. *The grounds for protest filed with the General Accounting Office must be fully supported to the extent feasible.* See § 20.2(d) with respect to time for filing *any additional statement required in support of an initial protest.*

(d) No formal briefs or other technical forms of pleading or motion are required, but a protest and other submissions should be *concise*, logically arranged, and *direct*. [Italic supplied.]

SCI points out that Kappa's September 10, 1976, protest clearly did not raise the "best and final offer" issue, since while that statement mentioned ASPR §§ 3-101 and 3-801.1, it did not mention ASPR § 3-805. In this regard, we note that Kappa in its December 3, 1976, letter to our Office states that it was actually aware of the grounds for its objection when it learned of the award on September 10, 1976. In this light, SCI argues that an "umbrella" ground of protest—the contention that the award was not that which is most advantageous to the Government—is not sufficiently specific, direct and concise. Further, SCI contends that a request by GAO for an additional statement in support of the protest clearly presupposes that a ground of protest has been filed and cannot operate to toll the time limits for filing a ground of protest.

Kappa contends that its objection was timely raised. First, Kappa notes that its September 10 protest objected that the award was not that which is most advantageous to the Government, price and other factors considered. Kappa contends that under standard protest practice, even more general protest grounds are commonly stated in initial protest letters, and that GAO's typical response is to require

that specifies be furnished within a stated time. Kappa also asserts that the allegation of failure to request best and final offers is a specific allegation which relates to an award being made which was not most advantageous to the Government.

Initially, we do not agree with Kappa's suggestion or inference that a protester's reserving the right to subsequently raise new grounds of protest can toll our filing time limits. Rather, the timeliness standards for filing protests are objective criteria which must be complied with by protesters.

However, we believe Kappa's objection in this case was timely made. While SCI's arguments are supported to some extent by the language of the Bid Protest Procedures, to adopt the view espoused by SCI might result in protesters' delaying the filing of their protests until they were certain they were in a position to state all separate grounds of protest. This could be detrimental to a basic underlying objective of the Bid Protest Procedures, i.e., to attempt to assure that protests against the award or proposed award of contracts are promptly made.

SCI correctly points out that in some cases a protester's attempt to subsequently raise a separate ground of protest will be found untimely. A clear example is *State Equipment Division of Secorp National Inc.*, 55 Comp. Gen. 1467 (1976). There, the protest essentially objected to the contracting agency's determination that the protester's bid was nonresponsive. Later, at a bid protest conference, the protester objected that the awardee's bid was nonresponsive. Our Office pointed out that the latter objection was entirely independent of those previously raised and rejected it as untimely. For a similar result, see *Consolidated Airborne Systems, Inc.*, B–184369, October 21, 1975, 75–2 CPD 347, where the initial timely objection related to a refusal to grant waiver of first article testing and the subsequent untimely objection related to the bidder's nonresponsibility. See, also, *Radix II, Inc.*, B–186999, February 8, 1977, 77–1 CPD 94, where the protester's delay in adequately explaining several of its objections until after the agency's report had been received resulted in our Office's dismissing the arguments raised.

However, in the present case we do not believe that Kappa's objection regarding the request for best and final offers can be regarded as entirely separate from its initial statement of protest. We believe Kappa's objection is in the nature of additional support for its timely raised objection that the award made is not that which is most advantageous to the Government, price and other factors considered.

While we therefore find the present protest to be timely, we believe it is also appropriate to reaffirm that protesters should assert and substantiate all of their grounds of protest as promptly as possible.

As indicated by the above-cited decisions, failure to do so may result in portions of a protest being found untimely. In addition, even where, as here, the protester's subsequent objection is timely, the delay involved in substantiating all of the grounds of protest inevitably delays the ultimate resolution of the protest.

II.B. Merits of Kappa's Objection

The Air Force did not issue a written notification at the close of discussions advising the offerors that discussions were concluded and that best and final offers were being requested. The issue is whether this deficiency is sufficiently serious to cause our Office to uphold Kappa's protest.

Kappa does not deny that it received the Air Force's August 11 letter, quoted *supra*. However, there is some disagreement as to what transpired at the August 17 discussions. Both parties agree that some discussion was prompted by a statement in Kappa's initial proposal to the effect that while Kappa had based its proposal on the estimated number of work hours stipulated in the RFP, it believed a more cost effective approach was possible and would welcome discussion on this point.

In this regard, Kappa maintains that at the meeting the contracting officer "inferred" he was aware that the contract work could be done in less time than stated in the RFP; that he indicated he expected Kappa to do the job in less time; and that he told Kappa everything was "in line" on its proposal. Kappa contends that it was in effect persuaded or told by the contracting officer not to submit a revised proposal based upon a reduced man-hour estimate.

The contracting officer has stated that, in response to Kappa's position that fewer work hours be required, he explained why the firm-fixed-price, level of effort type contract was responsive to Kappa's concern in that (1) use of the contract was necessitated by difficulty in estimating the work requirements, and (2) if fewer hours were involved during actual contract performance, the contract provided for a downward adjustment in contract price. The contracting officer indicates he neither stated nor intentionally implied that the work actually could be done in less time. The contracting officer further states that no technical discussions were held because Kappa's technical proposal was adequate as submitted. It is further reported that at the close of the meeting Kappa was carefully advised that, as stated in the August 11 letter, it could submit a revised proposal until the closing hour on August 23, and that no statement was made to Kappa to the effect that it could not submit a revised proposal of any kind. It is unclear from the record whether the oral advice given to

Kappa in the discussions included the term "best and final" offer. The contracting officer's statement implies that it did not, while the Air Force's February 15, 1977, report to our Office (which was not submitted by the contracting officer himself) asserts that it did. Kappa has not explicitly denied that the Air Force used the term "best and final" offer.

Where the only evidence before our Office with respect to a disputed question of fact consists of contradictory statements by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its assertions. *Telectro-Mek, Inc.*, B–185892, July 26, 1976, 76–2 CPD 81. Based on the record, we conclude that Kappa was notified of, and was in fact accorded, an opportunity to submit a revised proposal. Moreover, whether specific reference to "best and final" offers was conveyed to Kappa or not, there were in any event other circumstances strongly suggesting that further discussions were not contemplated. For one thing, the RFP's evaluation factors (quoted in part *infra*) indicated that once the basic adequacy of technical proposals had been established, the Air Force would look to the most advantageous price in making an award. This, coupled with the relatively limited scope of the discussions with Kappa and the other offerors, would reasonably indicate that the opportunity to submit a revised proposal by August 23, 1976, simply amounted to a final chance for offerors to revise their proposals before the Air Force proceeded with an award. Also, RFP amendment No. 1, July 13, 1976, had indicated that "award/contract start" might be accelerated to October 1, 1976.

Under the circumstances, therefore, we are not persuaded that the lack of written notification concerning the closing of discussions and requesting "best and final" offers is so compelling as to call for our Office to object to the award. In this regard, the record suggests to us that the alternative proposal which Kappa states it had prepared but did not submit on August 23, 1976, was based upon requirements different from those contained in the RFP. The implication is that the real gravamen of Kappa's complaint is not that it lacked notice of best and final offers, but that it objected to the terms of the RFP. However, as noted *supra*, Kappa did not raise its objections to the RFP in a timely manner.

Further, we believe the decisions of our Office relied on by Kappa are distinguishable. The basic issue in *Operations Research, Incorporated*, 53 Comp. Gen. 593 (1974), 74–1 CPD 70 (modified by 53 Comp. Gen. 860 (1974), 74–1 CPD 252) and 51 Comp. Gen. 481 (1972) involved the situation where an offeror initially found to be within the competitive range is given no opportunity to revise its proposal. Here, Kappa had an opportunity to revise its proposal. 50 Comp.

Gen. 222 (1970) involved the complete failure to establish any common cutoff date for proposal revisions. Here, August 23, 1976, was the common cutoff date for the three offerors. In 48 Comp. Gen. 536 (1969), an attempt to close negotiations was ineffective because, unlike the present case, one offeror thought negotiations had already been closed and that it was merely being requested to confirm or extend its offer. 50 Comp. Gen. 246 (1970) involved circumstances where an RFP amendment reduced the performance time; the protester's response indicated several possible approaches to estimated labor costs, a possible reduction in such costs, and that it was available for discussion. In the present case, the Air Force's notification concerning revised proposals did not change the RFP requirements, and Kappa did not respond to it. Finally, in *ABC Food Service, Inc.*, B-181978, December 17, 1974, 74-2 CPD 359, the agency's request for revised proposals, unlike the present case, explicitly indicated that negotiations would not close upon receipt of the revised proposals, i.e., the request for revised proposals indicated that a request for best and final offers would be forthcoming after receipt of the revised proposals.

In contrast to the foregoing decisions, we believe the present case is more similar on its facts to *James R. Parks Company*, B-186031, June 16, 1976, 76-1 CPD 384. There, as here, the agency was apparently proceeding with the intent to make an award on the basis of the initial proposals, but in fact conducted discussions. A second amendment to the RFP incorporated an additional clause, and offerors responded to this with revised proposals by a common cutoff date. While the RFP amendment did not contain all of the specifics of a request for best and final offers required by ASPR § 3-805.3(d), we found that it had the "intent and effect" of such a request and denied the protest.

In view of the foregoing, we agree with Kappa that the Air Force did not fully comply with the requirements of ASPR § 3-805.3(d), but do not believe that an objection to the award is warranted. However, as noted *infra*, we are calling this deficiency in the agency's procurement procedures to the attention of the Secretary of the Air Force.

III. Type of Contract

Kappa also maintains that the Air Force erred in awarding a firm-fixed-price, level of effort (FFP-LOE) type contract for this work. Kappa contends that two criteria for use of FFP-LOE contracts set forth in ASPR § 3-404.7 (1976 ed.) are not met in the present case—i.e., that the work to be performed cannot otherwise be clearly defined, and that there is reasonable assurance that the desired result cannot be achieved by expenditure of less than the stipulated effort.

The Air Force believes this argument is without merit; also, the agency and SCI take the position that Kappa's objection is untimely. In this regard, our Bid Protest Procedures provide that protests against improprieties which are apparent in an RFP as initially issued must be filed prior to the closing date for receipt of initial proposals, and that alleged improprieties which are subsequently incorporated in the RFP must be protested not later than the next closing date for receipt of proposals. See 4 C.F.R. § 20.2(b)(1)(1976).

Thus, a protest after award, challenging the type of contract contemplated by the RFP, is untimely. See, for example, *Bayshore Systems Corporation*, B–184446, March 2, 1976, 76–1 CPD 146. We note that such results are consistent with the principle applied by the courts that it is not proper for an offeror which acquiesces in a particular procurement method or procedure to later complain, after award has been made to another, that the method or procedure was improper. See *Airco Inc.* v. *Energy Research and Development Administration*, 528 F. 2d 1294, 1300 (7th Cir. 1975).

Kappa admits it was aware when it examined the RFP that award of an FFP–LOE contract was contemplated. However, the protester states that it was unfamiliar with this type of contract and did not actually become aware of the impropriety until September 10, 1976, when it consulted with its counsel and reviewed the relevant ASPR section.

Kappa's position is without merit. The impropriety which is alleged should have been apparent to a prospective offeror upon receipt of the RFP and reasonable examination and consideration of its contents. Moreover, Kappa—the incumbent contractor—would appear to have been in a particularly good position to promptly call this issue to the Air Force's attention. Also, consultation with counsel is not a valid basis for extending the protest filing time limit. *Power Conversion, Inc.*, B–186719, September 20, 1976, 76–2 CPD 256.

Kappa also argues that its objection, if found untimely, should nonetheless be considered on the merits by our Office because it involves a "significant issue" (4 C.F.R. § 20.2(c)). Kappa has offered no reasons why the issue involves a procurement principle of widespread interest, and we find none. See, generally, *Catalytic, Inc.*, B–187444, November 23, 1976, 76–2 CPD 445.

IV. Evaluation Factors

Kappa next contends that the RFP's statement of evaluation factors was defective. The protester alleges (1) that the RFP did not contain specific criteria to be used in the evaluation of technical proposals, and (2) that the relationship of price to technical considerations was not adequately expressed.

The Air Force maintains that the RFP's statement of evaluation factors was adequate and established price as the ultimate award criterion. Also, the agency and SCI assert that the protest on this issue is untimely.

Section "D" of the RFP, entitled "EVALUATION AND AWARD FACTORS," is three pages in length. The section begins with paragraph 1, which states in its entirety:

> 1. *AWARD*
> Award of any contract resulting from this solicitation will be determined in the following manner:
> a. Negotiation based upon the pricing provided.
> b. Less discount for prompt payment.

Paragraph 3(b) further states in pertinent part:

> * * * Technical Proposals submitted under this solicitation shall be evaluated by a Technical Review Board. The following areas will be considered by the Board in its evaluation of *basic adequacy* of each proposal; therefore, each Technical Proposal should specifically include the following:
> (1) Acknowledgement of the specific tasks and responsibilities set forth in the Statement of Work. A simple statement of acknowledgement is sufficient unless implementing procedures or more detailed coverage is appropriate.
> (2) The proposed contractor organizational chart, including management/operational responsibilities.
> (3) The proposed manning chart, indicating skill categories and number of personnel.
> (4) The proposed work schedule setting forth the timetable for task accomplishment.
> (5) Generalized position descriptions for all proposed personnel, indicating their education and experience level in comparison to the required level established in the Statement of Work and extent of current availability of such personnel, including any recruitment/retention plans.
> (6) Specifics concerning the proposed Colorado Springs area office, e.g., location, square footage, parking accommodations, etc. [Italic supplied.]

Further, amendment No. 1 to the RFP, dated July 13, 1976, provided the following question submitted by a prospective offeror and the Air Force's answer:

> Q. What specific evaluation criteria will the Government use to rate proposals? Will there be a weighting of cost *vs.* technical factors?
> A. See RFP Section D, Para 3b. Each technical proposal will be evaluated for *basic adequacy*, specifically in regards to the information submitted in response to Subparas (1) through (6). There will be no weighting of factors, cost or technical. [Italic supplied.]

The protester contends that the foregoing information does not tell how technical proposals would be evaluated, and that it does not establish price as the determinative factor in making an award. Kappa believes that amendment No. 1's reference to "no weighting" of factors is enigmatic and confusing, and that Kappa was misled because during the negotiations (August 17, 1976) the contracting officer wittingly or unwittingly used this state of confusion to convince Kappa that it was unnecessary to submit a revised proposal. The protester states that it drew the only logical conclusion under the circumstances, i.e., it assumed that price and technical factors would be weighted equally. Kappa maintains that it learned for the first time at a September 14,

1976, debriefing that the Air Force attached predominant importance to the price factor and, therefore, that its protest raised this issue in a timely manner.

Since the RFP as amended contained a detailed statement of the price and technical considerations applicable in the procurement, and since the offerors' attention was specifically called to the relative importance of the evaluation factors by the question and answer in RFP amendment No. 1, we believe the solicitation impropriety which Kappa alleges can only be considered "apparent." In this regard, it must be noted that the obligation rests on the offerors to carefully scrutinize the RFP, including the evaluation factors, and to seek clarification from the agency if necessary. *Honeywell, Inc.*, B–184825, November 24, 1975, 75–2 CPD 346. Also, as noted previously, the contracting officer denies that Kappa was told in the discussions not to submit a revised price proposal. Further, we find no indication in the record that Kappa posed any specific questions to the Air Force during the discussions for the purposes of obtaining clarification of the evaluation factors.

Since the alleged solicitation impropriety was apparently, we do not believe that Kappa, by relying on its own assumption as to the meaning of the RFP's terms, can obtain consideration of this issue on the merits. Kappa's protest should have been filed not later than the closing time for receipt of revised proposals on August 23, 1976. Also, for the same reasons as those applying to the FFP–LOE contract issue, *supra*, we do not find this to be a significant issue pursuant to 4 C.F.R. § 20.2(c).

V. Conclusion

In view of the foregoing, the protest is denied.

As noted *supra*, by letter of today we are calling to the attention of the Secretary of the Air Force our conclusion that the requirements of ASPR § 3–805.3(d) were not fully complied with in this procurement, so that this information can be brought to the attention of the personnel involved with a view towards precluding a repetition of similar difficulties in future procurements.

[B–188275]

Contractors—Incumbent—Competitive Advantage

If not the result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency.

Bids—Evaluation—Testing Costs

General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable.

Armed Services Procurement Regulation—First Article and Initial Production Testing

Armed Services Procurement Regulation 1-1903(a)(iii) controls both first article testing and initial production testing.

Contracts—Specifications—Samples—Tests to Determine Product Acceptability

Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency.

Contracts—Specifications—Tests—Initial Production Testing—Waiver

Decision to grant waiver of initial production testing is matter of administrative discretion to which GAO will not object in absence of clear showing of arbitrary or capricious conduct on part of procuring officials.

Contracts—Specifications—Tests—Waiver—Invitation Provision

Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate.

Contractors—Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions—Fraud

Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility criteria are not being applied.

In the matter of Boston Pneumatics, Inc., June 9, 1977:

Boston Pneumatics, Inc. (BPI), protests the award to Southwest Truck Body Company (Southwest) for the production of 181 tool trailers under invitation for bids (IFB) DAAK01-77-B-5094 issued by the Army Troop Support Command (TROSCOM).

BPI bases its protest on the following contentions:

(1) The IFB is restrictive of competition by allowing a $66,000 waiver of initial production testing where Southwest (the previous contractor under a similar contract) is the only contractor that could qualify.

(2) The absence of any provision in the IFB that the Government furnish a sample or "queen bee" gave Southwest an unfair advantage as the previous producer.

(3) Southwest cannot qualify for the waiver because the current IFB is for a product substantially different from its previous product.

(4) Award to Southwest is improper because Southwest is not a responsible contractor.

BPI's first two arguments concern the restrictive effect of the IFB. But we have frequently held that:

> * * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances. * * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected. * * * Rather, the test to be applied is whether the competitive advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government.

ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34 and cases cited therein; *Field Maintenance Services Corporation*, B-185339, May 28, 1976, 76-1 CPD 350; *Price Waterhouse & Co.*, B-186779, November 15, 1976, 76-2 CPD 412.

BPI urges that the waiver is a result of a preference or unfair action by the Government. BPI refers to the amount of the waiver afforded Southwest as being the prime indicator of favoritism and unfairness. Referring to our decision cited by TROSCOM (B-159582, September 7, 1966) in which we upheld a $6,500 evaluation factor, BPI stresses the great difference between $6,500 and $66,000. We decline to establish any rule that evaluation factors for testing over any particular amount are *per se* unreasonable. Instead, we will examine the evaluation factor to determine whether it bears a reasonable relation to the testing needs of the Government.

BPI argues that the $66,000 cost for testing is not an accurate reflection of the Government's testing requirements and that it is really a much lower figure than $66,000. As its first argument, BPI compares the $66,000 with the total contract cost of approximately $250,000 for a contract BPI had for producing 28 similar trailers in 1965. BPI shows that, at the rate of $66,000 for two trailers, the five trailers that it submitted for testing in 1965 would now cost $165,000 or 66 percent of the 1965 total contract price. However, aside from failing to take into consideration inflation over the last 12 years, that does not establish that the $66,000 testing costs are unreasonable for the amount of testing required.

While the Government was to conduct the initial production testing, for which it would add the $66,000 to the bids of those who did not qualify for a waiver, first article testing was to be conducted by the contractor. BPI alleges that the first article tests are exactly the same as the initial production tests and compares its bid price of $24,040 and Southwest's of $15,000 for equivalent testing to the Government's price of $66,000. The bidders, however, are in a competitive environment which provides an incentive to minimize costs and thus

may have been willing to absorb some of the first article testing costs to obtain an award. Therefore, we do not believe it is a fair comparison. However, if it were, we note that BPI's argument is based in part on the reasonableness of its $24,040 amount for first article testing. If the $24,040 were substituted for the Government's $66,000 evaluation factor that would still leave Southwest as the low bidder by more than $2,000.

TROSCOM's cost estimate for initial production testing is based on an estimated 2,000 man-hours to complete the tests at a rate of $13.80 per hour. Overhead at 122.5 percent of direct labor costs is also added. All of this totals $61,410. The difference between this and the $66,000 estimate was due to a change in rate structure from the time the original estimate was made; however, TROSCOM says that an allowance for a cost overrun due to test failures and/or test facility scheduling would make the $66,000 very reasonable. TROSCOM bases the above rates on other tests of similar items. We find no legal basis to question the reasonableness of this estimate.

BPI objects to the inclusion of the evaluation factor in the solicitation and argues that the Armed Services Procurement Regulation (ASPR) § 1-1903(a)(iii) (1976 ed.), which would otherwise require inclusion, is inapplicable because it applies only to first article testing. However, we have previously recognized that part 19 of ASPR, entitled "First Article Approval," defines "first article" as including both preproduction models and initial production samples. *Libby Welding Company, Inc.*, B-186395, February 25, 1977, 77-1 CPD 139. Therefore, we agree with TROSCOM that ASPR § 1-1903(a)(iii) provides for the evaluation factor and controls its application in the present case.

BPI alternatively argues that the ASPR § 1-1903(a)(iii) requirements were not met. BPI questions whether a thorough study and consideration of the pros and cons was made, whether proper criteria for use of the factor were established, whether the estimate is realistic, and whether the cost estimate is adequately documented in the contract file. However, ASPR § 1-903(a)(iii) only provides that--

> If the Government is to be responsible for first article testing, the cost to the Government of such testing shall be a factor in the evaluation of the bids and proposals to the extent that such cost can be realistically estimated. This estimate shall be documented in the contract file and clearly set forth in the solicitation as a factor which will be considered in evaluating the bids or proposals.

We believe that the TROSCOM estimate detailed above and set forth in the IFB as an evaluation factor meets the requirements of the regulation.

TROSCOM's position with respect to not providing a "queen bee" is that the specifications and drawings are adequate for the procurement without it. The determination of the Government's requirements

and the drafting of specifications to meet those requirements are responsibilities vested in the procuring activity. *Boston Pneumatics, Inc.*, B-185000, May 27, 1976, 76-1 CPD 345. Therefore, in the circumstances, BPI's preference to work from a sample provides no legal basis for overturning the agency's determination.

BPI's allegation that a waiver of initial production testing was improperly given to Southwest is a matter of administrative discretion to which we will not object in the absence of a clear showing of arbitrary or capricious conduct. *Charles J. Dispenza & Associates*, B-186133, April 27, 1977, 77-1 CPD 284. Attempting to show that waiver was improper. BPI lists numerous changes in the current IFB from the 1974 model produced by Southwest. TROSCOM points out that the changes in specifications listed by BPI are irrelevant because Southwest has worked more recently under a 1976 contract essentially identical to the current IFB specifications. BPI alleges that the more recent contract could not provide a basis for evaluation for the waiver in the present IFB because it is unlikely that the more recent product has been tested. BPI points out that Southwest's product under the 1976 contract was not tested either as a first article or under initial production testing. BPI then questions whether any item under the 1976 contract has yet been delivered, but TROSCOM informs us that it has accepted delivery on the units under the 1976 contract through its quality assurance representative. In that connection, section I-3-f of the IFB provides for waiver of the requirement for initial production testing if an offeror "has previously produced an essentially identical item." The section does not require the previously produced item to have been tested as a first article or under initial production testing. Since an essentially identical product was produced under the 1976 contract, this justifies TROSCOM's waiver. Therefore, the waiver has not been clearly shown to be arbitrary or capricious conduct by TROSCOM.

Concerning BPI's final argument that Southwest is not a responsible contractor, this Office does not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See *Central Metal Products*, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of the contractor's inability to perform. *Irvin Industries, Inc.*, B-187849, March 28, 1977, 77-1 CPD 217.

The protest is accordingly denied.

[B-186858]

Contracts—Negotiation—Offers or Proposals—Unacceptable Proposals—Prices Not Fixed

On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range.

Contracts—Negotiation—Requests for Proposals—Computer Time Sharing Services—Requirements—Memory Allocation

Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided.

Contracts—Options—Failure to Exercise *v.* Costs—Contention Without Merit

Contention that failure to exercise option years of contract will result in Navy's incurring substantial termination for convenience costs is without merit, since authority cited (*Manloading & Management Associates, Inc.* v. *United States*, 461 F. 2d 1299 (Ct. Cl. 1972)) involved estoppel situation where Government gave unequivocal assurances that contract option would be exercised. Present case involved mere assurance that options would be exercised subject to eventualities normally associated with year-to-year funding, and is distinguishable on other grounds as well.

Contracts—Options—Not To Be Exercised—Not in Government's Best Interest

Contractor and agency suggest that no recommendation for corrective action would be appropriate despite prior decision sustaining protest, because contract performance complies with requirements and protester suffered no prejudice. However, while some evidence in record indicates that contractor is providing "read protection" in computer timesharing services contract, written record does not establish that contract performance is fully in compliance with requirements, nor is it General Accounting Office's (GAO) function to make such determination. In any event, best interests of Government call for recommendation that contract option years not be exercised. 56 Comp. Gen. 245, modified.

General Accounting Office—Recommendations—Contracts—Prior Recommendation—Modified—Lapse of Time

Requests for reconsideration have not shown errors of fact or law in prior decision sustaining protest, and decision's recommendation for corrective action—

reopening negotiations—was correct at time it was made. Due solely to amount of time consumed by contractor's, agency's and protester's requests for reconsideration, and in view of approaching expiration of current contract term, GAO now changes recommendation: instead of reopening negotiations, Navy should not exercise two option years in current contract and should resolicit computer time-sharing services competitively. 56 Comp. Gen. 245, modified.

In the matter of the Computer Network Corporation, *et al.*—requests for reconsideration, June 13, 1977:

Computer Network Corporation (COMNET), the Naval Supply Systems Command (NAVSUP), and Tymshare, Inc., have each requested reconsideration of our decision which sustained Tymshare's protest in regard to the award of a contract for computer timesharing services.

Our decision *Computer Network Corporation et al.*, of January 14, 1977, 56 Comp. Gen. 245, 77-1 CPD 31, recommended that the Navy reopen negotiations, obtain revised proposals, and either award a contract to Tymshare (if it became the successful offeror) or modify COMNET's current contract pursuant to its final proposal (if it remained the successful offeror). The background facts and circumstances, which are complicated, are set forth in our earlier decision.

COMNET and the Navy maintain that decision reached an erroneous conclusion on an issue involving the Navy's acceptance of COMNET's proposal as complying with the computer security requirements set forth in the request for proposals (RFP No. N00600-76-R-5078). COMNET and the Navy contend that we should reverse our conclusion on this issue and withdraw our recommendation.

Tymshare contends that our decision was correct on the computer security issue but erroneously found that Tymshare's proposal failed to meet an RFP requirement that fixed prices be offered. Tymshare believes we should recommend a termination for convenience of COMNET's contract and a reinstatement of Tymshare's contract (Tymshare was the original awardee under the RFP; the Navy terminated Tymshare's contract for the convenience of the Government and made award to COMNET in August 1976 because it believed COMNET's protest against the award to Tymshare was meritorious).

The standard to be applied in considering these requests is whether the requesters have convincingly shown errors of fact or law in our earlier decision. See *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 972, 975 (1976), 76-1 CPD 240. Despite the extensive written submissions by all parties, very little in the way of genuinely new and material information has surfaced. We intend to concentrate in this decision on the issues which are dispositive of the requests for reconsideration.

Reconsideration of Fixed-Price Issue

Our earlier decision concluded that because of certain provisions in Tymshare's price proposal, it failed to offer fixed prices as required by the RFP. In this regard, paragraph C4 of Tymshare's price proposal provided:

> TYMSHARE reserves the right to revise its algorithm during the life of the contract to reflect changes in hardware costs, inflationary pressures, operating system improvements, etc. Should an algorithm change be considered, an analysis of the impact of these changes on Navy operations will take place, and appropriate negotiations conducted.

Tymshare's offered prices for various items of work were expressed in a direct relationship to its algorithm.

Tymshare's principal argument is that this language was merely a "request" to the Navy for the right to adjust the algorithm to permit Tymshare to charge other customers—not the Navy—higher prices. Tymshare points out that its method of operation generally calls for use of a single algorithm, which functions as a measure of units of service and price. Thus, the argument runs, if Tymshare was forced to change its algorithm because of its other business, it would negotiate with the Navy appropriate offsetting mathematical adjustments in the algorithm which would not, however, affect the agreed-upon contract prices. Tymshare contends that its commitment to conduct all appropriate negotiations with the Navy effectively reserved to the Navy the "final say" on what changes could be made, and cites *Chemical Technology, Inc.*, B-179674, April 2, 1974, 74-1 CPD 160, for the proposition that adjustment in a price formula which does not change the cost to the Government does not affect the firmness of a price proposal.

Despite Tymshare's subsequent explanations as to the meaning of this portion of its proposal, the intent of the proposal is basically to be determined from the proposal itself. *Dynalectron Corporation et al.*, 54 Comp. Gen. 562, 570 (1975), 75-1 CPD 17; modified (corrected) by 54 Comp. Gen. 1009 (1975), 75-1 CPD 341. In any event, the Navy's contract negotiator, in an affidavit dated March 11, 1977, states that prior to the award he never discussed this portion of the proposal with Tymshare.

Paragraph C4 plainly states, at a minimum, that Tymshare reserved the right to enter into negotiations after award of a contract. Further, the most reasonable interpretation of the references to "changes in hardware costs," "inflationary pressures," and "impact of these changes on Navy operations"—considered together with the fact that Tymshare's proposed prices were directly related to its algorithm—is that the subject of the post-award negotiations would be changes in the contract prices. An alternative interpretation of paragraph C4 is that Tymshare reserved the right to unilaterally make price changes, with

the post-award negotiations being limited in scope to the consequential effects of the changes on Navy operations.

In any event, the interpretation that paragraph C4 merely left open the opportunity for possible price changes is enough to support a conclusion that Tymshare's proposal failed to offer fixed prices. In this regard, we note that in formally advertised procurements, a bid reserving the right to negotiate material terms and conditions is a qualified bid and must be rejected. 42 Comp. Gen. 96 (1962). Also, in *Applied Management Sciences, Inc.*, B–182770, July 1, 1975, 75–2 CPD 2, where a bid contained references both to a fixed price and to negotiation, the bid was ambiguous and was properly rejected as nonresponsive. In negotiated procurements, as here, negotiation has been defined as any opportunity to revise or modify a proposal. 51 Comp. Gen. 479 (1972).

We believe it is clear that by leaving open the opportunity to effect post-award changes in its prices, Tymshare's proposal failed to offer fixed prices. Whether the Navy might have been able to successfully reject price changes in the post-award negotiations is immaterial. Therefore, where, as here, an RFP requires fixed prices and a proposal does not offer fixed prices, the proposal as submitted cannot be considered for award. *Burroughs Corporation*, 56 Comp. Gen. 142 (1976), 76–2 CPD 472; *Computer Machinery Corporation*, 55 Comp. Gen. 1151 (1976), 76–1 CPD 358, affirmed *C3, Inc., et al.*, B–185592, August 5, 1976, 76–2 CPD 128. Also, Tymshare's reliance on the *Chemical Technology* decision is misplaced. In that case, a bid was found to be responsive because a firm extended price could be ascertained from hourly price quotes in the bid, notwithstanding the bidder's failure to quote monthly unit prices as required. In the present case, Tymshare's proposal prices are not firm because the proposal left open the opportunity to change the prices after award.

Tymshare also contends, citing *Computer Machinery Corporation*, that since this was a negotiated procurement the Navy could simply have rejected paragraph C4 and made an award based upon the remainder of the proposal. *Computer Machinery Corporation* does not support this contention. That decision involved a situation where offerors' proposals contained various methods of acquisition for ADPE, including lease plans. Each method or plan was essentially a separate and independent alternative by which the Government could obtain ADPE. One of the successful offeror's lease plans was unacceptable. Our Office recommended that the agency reevaluate the proposals, excluding the unacceptable lease plan. In the present procurement, there was only one acquisition method or plan—the purchase of computer timesharing services at fixed prices. The defect in

Tymshare's proposal could not be cured without reopening negotiations with all offerors within the competitive range.

Tymshare next contends that the Navy procuring activity did delete paragraph C4 of its proposal in making the award, which the Navy denies. This contention is based on the fact that while paragraph C4 appears in the Tymshare proposal, it does not appear in the Standard Form 26 contract document.

As already noted, this allegation, if true, would mean that further negotiations would be required. In any event, we believe paragraph C4 was part of the contract because, as the Navy points out, its acceptance of the proposal (containing paragraph C4) consummated the contract. The rule in this regard is that the Government's acceptance may not vary the terms of the offer. *Kenneth David Ltd.*, B-181905, March 17, 1975, 75-1 CPD 159. We do not believe it is necessary to discuss the Navy's explanation of how paragraph C4 came to be deleted from the Standard Form 26 pricing schedule.

Reconsideration of Computer Security Issue

The RFP established various requirements regarding the Privacy Act of 1974 (5 U.S.C. § 552a (Supp. IV, 1974)) and computer security, including the following:

> Main memory protection must insure the integrity of a user's area during operations. (RFP Section F.VII.A.3(d))

and

> The proposal must include a detailed description of all security measures and procedures. (RFP Section F.VII.A.5.)

With reference to the main memory protection requirement, our earlier decision held:

> We believe this requirement is open to only one reasonable interpretation, namely, that an offeror's hardware/operation system configuration must include "read" protection. After reviewing COMNET's proposal, we conclude that the hardware/operating system configuration it proposed - the OS/MVT operating on the IBM 360/65 -cannot protect against read access to the main memory of the CPU without considerable modification. While COMNET's submissions in the protest proceedings state that it has made considerable modifications to the standard OS/MVT, after reviewing the COMNET proposal we do not believe the proposal demonstrates that the memory protection requirement has been met. Based upon this and our examination of the record of the Navy's technical evaluation of proposals, we believe the Navy's acceptance of the proposal in this respect lacked a reasonable basis, and amounted to an improper relaxation of a material security requirement without amending the RFP pursuant to ASPR § 3-805.4 to allow further competition on the basis of the relaxed requirement.

In reaching this conclusion we utilized the assistance of technical experts, who have again participated in our consideration of the requests for reconsideration.

There is no disagreement concerning our interpretation that the RFP required read protection. The issue on reconsideration relates

to our conclusion that the Navy acted unreasonably in deciding to accept the COMNET proposal despite the proposal's failure to demonstrate compliance with the requirement.

The most significant item of evidence brought forward during the reconsideration is an affidavit dated January 28, 1977, by the head of the Navy's technical evaluation panel. This affidavit states in pertinent part:

1. * * * From the outset * * * it was the panel's opinion that the COMNET proposal met section VII.A.3.d. of the solicitation which required that "main memory protection must ensure the integrity of a user's area during operations." This conclusion was based on the following:

(i) COMNET's system was not a standard, unmodified OS/MVT system. (We were well aware that the standard OS/MVT system did not meet the security requirements of the RFP.)

(ii) COMNET's statement on page 54 of their proposal that "the COMNET security system, through the use of the storage protection feature insures that main memory and disk storage are protected in the areas where authorization and validation operations are being conducted, or where such data is stored." To us, "storage protection" meant read and write protection.

(iii) COMNET's stated capability for converting a SYSABEND dump to SYSUDUMPs indicated that COMNET's system was designed to prevent a user from getting a copy of information contained in a part of main memory to which he was not authorized access through a SYSABEND dump by causing his program to abnormally terminate. If a user were allowed to obtain a SYSABEND dump he could possibly circumvent the read protection provided by COMNET's storage protection features. A SYSUDUMP permits a user to obtain information only from the area of main memory in which his program is executing.

Our initial conclusion with regard to the acceptability of COMNET's security provisions was reinforced by the following statements in COMNET's revisions to their technical proposal dated 1 March 1976:

(1) "The improved security and accounting/billing systems as defined within the proposal are in final stages of completion and testing and will be installed prior to the award of this contract." (See p. 1 of revisions.)

(ii) "The Data Manager is protected by COMNET's storage protection feature which insures that main memory and disk storage are protected in the areas where authorization and validation operations are being conducted or where such data are stored." There was no doubt in our minds that this included "read" protection, since "read" protection would have to be provided to adequately protect passwords and security procedures in the data manager's area from perusal by someone trying to break the system. (See p. 5 of revisions.)

In view of the above, it was my opinion, as it was the opinion of the panel, that COMNET met the memory protection requirement of the solicitation.

The first difficulty is with the conclusion that COMNET's proposal offered read protection because of its references to "storage protection." None of the parties have cited legal precedent defining either term, nor are we aware of any. However, the Navy does cite one technical definition of storage protection as "The prevention of access to data in storage for any purpose, such as reading or writing. (Synonymous with *Memory Protection.*)" Weik, Martin H., *Standard Dictionary of Computers and Information Processing*, Hayden Book Company, Inc.: New York, 1969.

We note that another definition of storage protection is "A feature which includes a programmed protection key that prevents the read-in of data into a protected area of main memory and thus prevents one

program from destroying another." Sippl, Charles J., *Data Communications Dictionary*, Van Nostrand Reinhold Company: New York, 1976. This definition indicates *write* protection, but does not convey that *read* protection is an integral part of the term storage protection.

In the absence of a generally accepted and authoritative definition of storage protection as including read protection, we believe the Navy acted unreasonably in assuming that read protection was being offered when the proposal spoke of storage protection.

Even assuming that COMNET's proposal offered read protection, the more serious question concerns the degree to which the proposal demonstrated that read protection would be furnished. A number of technical reasons cited in the affidavit do not support the Navy's conclusion that the proposal adequately demonstrated satisfaction of the requirements. For instance, paragraph 1(ii) of the affidavit cited page 54 of the proposal which refers to a "storage protection feature." The term is in itself meaningless without being defined. Without a description of this feature, an adequate evaluation would be impossible. Further, the proposal's statement only indicates protection in areas where authorization or validation operations are being conducted, or where authorization and validation data is stored. It does not indicate protection of user areas.

However, the Navy and COMNET contend that the proposal's statements concerning conversion of SYSABEND dumps to SYSUDUMPS showed protection of user areas. COMNET, for instance, makes much of its proposal's statements that this modification permits "only user core storage" to be dumped, and that any attempt to violate "the security of the system" will result in abnormal termination of the user's job. COMNET maintains that the affidavit shows an adequate understanding and evaluation of these points on the part of the Navy, since it restates "in functional terms" what actually occurs.

We agree that a modification to convert all SYSABEND dumps to SYSUDUMPS is a highly desirable security feature in a timesharing environment, and that such conversion provides a measure of read protection in those situations where dumps are involved—i.e., where a user is obtaining a print-out of information stored in the main memory. As the affidavit states, in a dump situation the modification would permit a user to obtain information only from the area of main memory in which his program is executing. However, this conversion or modification alone does not constitute full read protection; it does not encompass protection which would prevent a user's program from accessing areas of main memory outside the user's assigned segment. Further, the affidavit indicates the Navy relied on bare statements in the COMNET proposal as to this capability, without obtaining

additional evidence through documentation or by demonstration prior to award.

Aside from the affidavit of the technical evaluation panel chairman, the only other contemporaneous evidence of the technical evaluation is the record of written questions posed by the Navy to COMNET and COMNET's answers, which we considered in reaching our earlier decision. The Navy did not pose any specific question dealing with the requirement that main memory protection must ensure the integrity of a user's area during operations.

During the reconsideration of this case we requested the Navy to furnish whatever internal standards it has for evaluation of technical proposals involving ADPE work or for benchmarking. The Navy furnished a publication entitled "Handbook for Preparation of Vendor Benchmark Instructions," October 29, 1976, published by its Automatic Data Processing Equipment Selection Office (ADPESCO). The Handbook states at p. 31:

> A functional demonstration verifies the vendor's ability to meet a requirement. The need for a functional demonstration often cannot be established until the vendor proposals are evaluated. * * * Quite often the requirement for a functional demonstration can be satisfied through other sources such as more detailed vendor documentation, clarification of existing vendor documentation or experience attained from another user activity with a similar configuration.
>
> * * * * * * *
>
> Functional demonstrations are appropriate when combinations of the following exist:
>
> a. Aspects of the vendor's proposal to meet a computer system requirement are questionable and other means cannot be found to adequately support his claims.
>
> b. The objective for requiring a functional demonstration can be clearly defined. * * *

While no suggestion has been made that the Handbook establishes binding legal guidelines, it does shed some light on the evaluation steps which may be necessary to resolve questionable technical areas in a proposal. As indicated above, those steps would involve either the obtaining and analysis of more detailed technical documentation than is contained in the proposal, or conducting a functionl demonstration of mandatory security requirements. We believe that the present issue—the COMNET proposal's demonstration of read protection of main memory—is precisely the type of questionable area to which the Handbook's guidance is directed.

Other technical materials submitted by the Navy in support of its position include a January 25, 1977, affidavit by a computer consultant. The substance of this individual's views—that the Navy had a reasonable basis to conclude from page 54 of the COMNET proposal that read protection was being offered—has already been treated above. Moreover, this individual's conclusions were reached based upon his examination of the COMNET proposal after our January 14, 1977, decision had been rendered, whereas the issue involves the reasonable-

ness of the Navy's judgment during the technical evaluation of proposals in 1976.

Similarly, subsequent to our January 14, 1977, decision NAVSUP and the procuring activity—the Washington, D.C. Naval Regional Procurement Office (NRPO)—sought an independent technical opinion from ADPESO, which was not otherwise involved in the procurement. The ADPESO expert's statement is essentially conclusory—findings that COMNET's "ALPHA" system solved the problem of read protection—and does not address the issue of how the COMNET proposal adequately demonstrated that read protection would be furnished.

Further, COMNET has made many arguments in support of its position. For instance, COMNET, while admitting that its proposal did not go into "great detail" on computer security, contends at length that nothing in the RFP required any "exhaustive disclosure" regarding security. In view of the plain language of the RFP to the contrary, we believe this argument is frivolous. RFP Section D.1.B., p. 16, required technical proposals to be sufficiently detailed so as to enable technical personnel to make a thorough evaluation of the offeror's capability to meet the statement of work, and stated:

> To this end, the technical proposal should be so specific, detailed and complete as to clearly and fully demonstrate that the Offeror has a thorough understanding of the requirement and the capability to accomplish the task.

As already noted, RFP Section F.VII.A.5 required a detailed description of all security measures and procedures. The language of the RFP in this regard could hardly be less equivocal.

"[I]t is axiomatic in negotiated procurement that an offeror must demonstrate affirmatively the merits of its proposal and that such merit is not to be determined by unquestioned acceptance of the substance of the proposal." *Kinton Corporation*, B-183105, June 16, 1975, 75-1 CPD 365. The degree of demonstration required will vary depending on the circumstances of the case. Compare, for example, *Julie Research Laboratories, Inc.*, 55 Comp. Gen. 374, 383 (1975), 75-2 CPD 232 (where offerors were required to respond to the statement of work on a paragraph-by-paragraph basis to demonstrate how the requirements would be met) with *Moxon, Incorporated/SRC Division*, B-179160, March 13, 1974, 74-1 CPD 134 (where the RFP stated exact requirements and offerors were not requested to explain their proposals by narrative or descriptive information). In the present case, it is abundantly clear that the RFP required a rather thorough demonstration in the proposal regarding computer security. COMNET did not provide it.

COMNET next contends that it deliberately and properly did not provide in its proposal details of its extensive, proprietary ALPHA

modifications to the OS/MVT operating system because to do so would have been inherently self-defeating and would have violated the principle that disclosure of confidential security information should be limited to those with a "need to know." NRPO itself rejects this argument, stating that submission of security details would not subvert security provided that precautions were taken by the Navy to protect the confidentiality of the details. Where adequate safeguards are taken to protect an offeror's proprietary information and evaluation of the information is necessary, an offeror's refusal to provide it can justify rejection of the offeror's proposal. See 51 Comp. Gen. 476 (1972). In any event, we believe that COMNET could have provided an adequately detailed description of its security methods and procedures without submitting volumes of proprietary information.

COMNET further contends that the fact that Tymshare's proposal provided no more detail on computer security than did COMNET's shows that COMNET provided a reasonable amount of detail. We believe it is unnecessary to decide whether the Navy acted reasonably in accepting Tymshare's proposal as being adequately detailed in regard to computer security. It is sufficient to note that Tymshare offered a significantly different hardware/software configuration, and that the description of this configuration in Tymshare's proposal provided a clearer indication of how the main memory protection requirement would be met than did COMNET's.

COMNET and NRPO also suggest that the Navy's technical evaluators had some familiarity with the workings of COMNET's ALPHA system. COMNET, for instance, states that the Navy "was aware of the differences between ALPHA—the system offered—and the IBM OS/MVT operating system." The lack of read protection in the OS/MVT is well known. *PRC Computer Center, Inc., et al.*, 55 Comp. Gen. 60, 91–95 (1975), 75–2 CPD 35. COMNET contends that since it was offering its highly modified ALPHA system and the Navy was aware of the differences, it was reasonable for the Navy to accept the COMNET proposal.

However, so far as the record shows, the evaluators' knowledge in this regard extended very little beyond the bare fact that COMNET had made or was making various "modifications" to the OS/MVT which the COMNET proposal did not describe in detail. See the affidavit of the technical evaluation panel chairman, *supra*. Since the COMNET proposal did not contain detailed information and since there is no showing that any evaluators obtained such knowledge independently of the contents of the proposal, there is nothing in the record to support a conclusion that the evaluators had actual knowledge of the details of COMNET's computer security methods or of how COMNET was to provide read protection.

In this same connection, NRPO points out that the chairman of the technical evaluation panel "had read the ALPHA manual and facilities guide and hence was quite familiar with the ALPHA system." The ALPHA User Manual and the COMNET Facilities Guide were two of several attachments to the COMNET proposal. Apparently due to an oversight, the attachments were not submitted to our Office by the Navy in its reports on the protests. Thus, these materials were not taken into consideration by our Office in reaching our earlier decision.

The ALPHA User Manual is a document which describes the functions and commands of an extensive, remote, conversational time-sharing supplement to IBM 360/370 systems. It specifically provides a simple interface to OS/MVT. It does not contain any direct technical information regarding the ALPHA-OS/MVT interface or how the parts of the system are organized and supported. It does not have a separate or extensive discussion of security features, except for some references to the use of passwords to protect access to data sets and libraries. The bulk of the manual is a description of the syntax and semantics of some 46 terminal user commands.

We do not believe that reliance on this manual could afford a reasonable basis for a conclusion by the Navy that COMNET's proposal demonstrated compliance with the RFP requirements. Similarly, the other attachments—a COMNET Facilities Guide (a manual describing the functions and use of a computer-based text and document editor) and IBM OS COBOL Manual (a reference manual for an interactive on-line COBOL program writing debugging facility) could not provide such a basis.

The failure to furnish these attachments to our Office does not, therefore, affect the outcome of this case. However, by letter of today to the Secretary of the Navy, discussed *infra*, we are suggesting that responsible Navy officials be reminded that it is imperative that our Office be furnished complete reports in response to protests.

It is significant also that COMNET's proposal indicated that its security modifications were incomplete at the time the proposal was submitted. COMNET argues that all legal requirements are met as long as the system would be operative at the time of award, citing *Omnus Computer Corporation*, B–183298, October 9, 1975, 75-2 CPD 216 and *Sycor, Inc.*, B–180310, April 22, 1974, 74-1 CPD 207. In *Omnus*, however, unlike the present case, the agency had a reasonable basis to conclude from the successful offeror's technical proposal that the proposed system had the capability of performing in accordance with the specifications. Similarly, *Sycor*, where a successful offeror was given a few days to correct minor oversights in its live test demonstration—which did not alter or modify the offeror's proposal—is not good authority for the contention advanced by COMNET. That a suc-

cessful offeror would not be required to put a conforming system into operation until the time of award does not excuse the failure to submit a proposal adequately demonstrating that a conforming system would be furnished.

COMNET also suggests that whether it would furnish read protection is a question of responsibility, not a question as to the technical acceptability of its proposal, citing *United Computing Corporation*, B–181736, January 16, 1975, 75-1 CPD 23. That case involved a question of responsibility as to whether an offeror possessed software it had promised to furnish in accordance with certain specifications. However, the terms of the present RFP indicate that whether a proposal demonstrated satisfaction of computer security requirements was a question relating to the technical acceptability of the proposal. The computer security requirements in Section VII of the RFP Schedule are not phrased in terms of responsibility. Further, under the sequence of events established in the RFP, the technical evaluation of proposals' compliance with the requirements preceded the submission of price proposals, which in turn preceded consideration of a successful offeror's responsibility as a prospective contractor. In accordance with this scheme, after NRPO had evaluated the technical proposals, it advised COMNET and Tymshare that their proposals were technically acceptable—not that they had been determined to be responsible prospective contractors.

COMNET next contends that its system is currently providing read protection during the performance of the contract, citing as evidence a test of the system conducted by NRPO on January 24, 1977. While it is not alleged that the test encompassed a comprehensive demonstration of the security of the entire system, COMNET and NRPO maintain it did show that read protection is in effect.

We do not see the relevance of this argument. The issue treated in our earlier decision involved the reasonableness of the Navy's judgment in evaluating the COMNET proposal and deciding that it adequately demonstrated satisfaction of the main memory protection requirements. This issue relates to the propriety of the award, not to conformance with the requirements or actual satisfaction of the Government's needs after award. See the discussion of this point in *Corbetta*, *supra*, at 975–976.

COMNET attempts to distinguish *Corbetta* on the grounds that the successful offeror in that case had made only a blanket offer of compliance with the requirements, whereas here COMNET specifically offered to meet the requirements. However, as already noted, we do not believe the Navy had a reasonable basis to conclude that the COMNET proposal even offered full read protection. In any event, we think the

distinction is unsound. Whether the contract was properly awarded is not dependent on how the contract is being performed, but upon whether the award is legally supportable. *Kenneth David Ltd., supra; Instrumentation Marketing Corporation*, B-182347, January 28, 1975, 75-1 CPD 60.

Whether read protection is now in effect may have some relevance to the type of remedy recommended by our Office where an improper award has been found. See the discussion *infra*.

Our earlier decision concluded that the Navy lacked a reasonable basis in determining that the COMNET proposal demonstrated compliance with requirement that main memory protection must ensure the integrity of a user's area during operations (i.e., read protection). After reconsideration, it is our view that the Navy could not reasonably determine from the COMNET proposal whether full read protection was being offered and how it would be provided. Accordingly, our earlier decision's conclusion has not been shown to be erroneous.

Reconsideration of Recommendation

In view of the foregoing, our earlier decision has not been shown to be erroneous in fact or law, and we believe that the decision's recommendation that the Navy reopen negotiations was correct at the time it was made.

However, COMNET's, Tymshare's, and the Navy's requests for reconsideration have consumed a substantial amount of time. From January 28, 1977, through April 1977, the three parties have made multiple written submissions in support of their respective positions. The COMNET contract expires on June 14, 1977. Therefore, it appears that reopening negotiations at this point in time is not a viable and practicable remedy.

The COMNET contract provides for two option years. In this regard, COMNET and the Navy—citing *Manloading & Management Associates, Inc. v. United States*, 461 F. 2d 1299, 198 Ct. Cl. 628 (1972)—assert that failure to exercise the options could result in the Government's incurring termination for convenience costs. COMNET maintains that the Government might be liable to the extent of about $1,700,000, and NRPO states that liability could exceed $1,000,000.

The *Manloading* case involved the award of a contract for data conversion work, the total volume of which would take two years; the term of the contract was only a few weeks but it provided the two option years. At a prebid conference, prospective bidders were told that funds were available and that there was "no question" that the option for the first year would be exercised. Due to a protest decision of our Office which recommended a resolicitation, the Government did

not exercise the first option year. The Court of Claims held that the doctrine of equitable estoppel effectively resulted in an amendment which renewed the contract, and that the contractor was entitled to recover in accordance with the termination for convenience clause of the contract.

COMNET and the Navy believe *Manloading* applies here because of the following question by a prospective offeror at the preproposal conference and the Navy's answer, which was contained in RFP amendment 0002:

> Q. Other than an earlier implementation of your planned in-house system in New Orleans, are there other eventualities which might cause non-renewal? If yes, what are they? [CSC]
> A. None, other than those normally associated with year-to-year funding.

This falls considerably short of the unequivocal assurance given by the Government in the *Manloading* case. There are many eventualities normally associated with year-to-year funding. Funds might be cut off, substantially reduced, or substantially increased; the Navy might decide to do the work in-house, or to combine it in a new procurement with work which had theretofore been procured separately. It is interesting to note in this regard that NRPO and COMNET mutually agreed that the term of the COMNET contract would be limited to the period from August 19, 1976, to June 14, 1977—rather than one full year—because of Navy "budgetary constraints."

Also, among the many other factors distinguishing the present case from *Manloading*, it is significant that there was apparently no fault or error on the part of *Manloading* in submitting its bid; the error was on the part of the Government in issuing a defective solicitation. In the present case, while there have been errors by the Navy in conducting the procurement, there was also a failure by COMNET to provide sufficient detail in its proposal on computer security. Therefore, unlike *Manloading* there is some doubt that COMNET had the "clean hands" necessary to obtain equitable relief.

For the foregoing reasons, we see no difficulty should the Navy decline to exercise the options in the COMNET contract. Also, nonexercise of the options is an appropriate protest remedy where reopening of negotiations is not practicable.

COMNET and NRPO, however, apparently believe that no recommendation for a remedy would be appropriate in this case in view of the fact that NRPO's security test on January 24, 1977, established that read protection is in effect during contract performance. Also, COMNET and NRPO suggest that any lack of detail in the COMNET proposal on computer security did not prejudice Tymshare.

In this regard, there is some authority for the proposition that even if a proposal is deficient in some way, the award will not necessarily be

disturbed if contract performance complies with the RFP requirements. See, for example, *I Systems Inc.*, B-186513, January 27, 1977, 77-1 CPD 65. There we found merit in the protester's argument that the successful proposal did not provide clear commitments from certain prospective employees of the contractor. However, the individuals did in fact become employees during contract performance, and we declined to disturb the award.

We have reviewed the information in the record concerning the January 24, 1977 security test. We believe the test did demonstrate that some form of read protection is in effect. However, the test was rather simple and did not disclose how read protection was implemented, or the adequacy of the protection feature. We do not believe that NRPO's test constitutes an adequate basis for determining that main memory protection must ensure the integrity of a user's area during operations.

Also, at COMNET's request, GAO representatives visited its Washington, D.C., facility on April 26, 1977, for the purpose of allowing COMNET to display internal company documents dealing with its computer security. This visit was not an *ex parte* conference allowing COMNET to make arguments in support of its request for reconsideration, nor was it a comprehensive on-site audit review of COMNET's security.

From this visit we ascertained that both hardware and software modifications had been made to the COMNET system. Some of the hardware modifications apparently were not completed until the time COMNET began performance of its contract, i.e., around October 1976. We also ascertained that a form of "fetch protection" is currently employed in the COMNET system dedicated to Navy use. Fetch protection is defined in the *Data Communications Dictionary*, *supra*, as "A storage protection feature that determines right of access to main storage by matching a protection key, associated with a fetch reference to main storage, with a storage key, associated with each block of main storage. See also storage protection." For the purposes of our present discussion, the fetch protection can be considered synonymous with read protection. However, as already noted, the scope of our review of this matter did not include the completeness and reliability of the modifications to the COMNET system; rather, it was limited to the question of whether the COMNET system had the ability to support fetch protection.

COMNET contends that any doubts as to the adequacy of its contract performance must be resolved by a GAO test of its computer security. We disagree. We have often pointed out that the adequacy of a contractor's performance is a matter of contract administration, which is the function of the contracting agency, not our Office. See, for

example, *Corbetta, supra*, at 987. Moreover, we believe it is incumbent upon the parties requesting reconsideration to bring forward the information and evidence necessary to substantiate their case. See, in this regard, *Houston Films, Inc. (Reconsideration)*, B–184402, June 16, 1976, 76–1 CPD 380; *Allen & Vickers, Inc.*, 54 Comp. Gen. 1100 (1975), 75–1 CPD 399.

Further, even if it was established that COMNET's security is completely in compliance with the RFP requirements, we do not believe that it would be appropriate for our Office to forego a recommendation for corrective action in this case. We believe the importance of the Privacy Act and related computer security requirements call for a recommendation that the options in the current contract not be exercised.

Conclusion

Our earlier decision is affirmed as being correct at the time it was made.

Due solely to the amount of time consumed by the requests for reconsideration, we now make the following recommendation: instead of reopening negotiations, the Navy should not exercise the option years provided for in the COMNET contract, and should resolicit on a competitive basis any requirement it may have for these services after the expiration of COMNET's contract on June 14, 1977.

By letter of today, we are advising the Secretary of the Navy of this change in our recommendation for corrective action, and also that the change does not affect the Navy's obligation to furnish written statements to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), concerning the action taken with respect to our recommendation.

[B–187687]

Officers and Employees—Transfers—Relocation Expenses—Administrative Determinations—Budget Constraints

An employee was denied relocation expenses incident to transfer from Philadelphia to Mechanicsburg, Pennsylvania, on the basis that budget constraints precluded reimbursement. The record fails to show that the agency made a determination as to whether transfer was in Government's interest. Federal Travel Regulations, para. 2–1.3 (May 1973), require that determination be made as to whether transfer is in Government's interest or primarily for convenience or benefit of employee or at his request. Our decisions provide guidelines to assist agenfit of employee or at his request. Our decisions provide guidelines to assist agencies in reaching such determinations. Here, employee is not entitled to reimbursement for relocation expenses since he applied for and otherwise took initiative in obtaining transfer.

In the matter of David C. Goodyear—relocation expenses, June 14, 1977:

This action results from the appeal by David C. Goodyear of the settlement Z–2587294, September 8, 1975, by our Transportation and Claims Division (now Claims Division). The settlement denied Mr. Goodyear's claim for the expenses of relocating his mobile home incident to his relocation from Philadelphia, Pennsylvania, to Mechanicsburg, Pennsylvania.

Mr. Goodyear was employed at the Marine Corps Supply Activity, Philadelphia, Pennsylvania. He states that in 1974 he learned that the activity would be closed sometime in 1976. Apparently motivated by this information, he applied and was accepted for a position at the Naval Ship Parts Control Center, Mechanicsburg, Pennsylvania. Upon asking whether he was entitled to transfer expenses, he was advised that one of the forms necessary to effecting the personnel action contained the following notice:

> In accordance with current regulations, it will be necessary for Mr. Goodyear to bear all expenses incident to reporting for duty.

The record is not clear as to whether Mr. Goodyear was made aware of this prior to the effective date of his transfer.

Mr. Goodyear traveled to his new duty station at his own expense; however, he states that he was under the impression that his moving expenses would be reimbursed by the Government. Specifically, he seeks to be reimbursed for the expenses he incurred in moving his mobile home to his new duty station. The Navy refused to reimburse him for such expenses, on the basis that the effect of the above-quoted phrase is to bar payment of travel, transportation, and relocation expenses in accordance with Naval Ship Parts Control Center policy. In this regard, a letter dated April 1, 1975, from the Director, Manpower Planning Division, Office of Civilian Manpower Management, Department of the Navy, advised that:

> [Naval Ship Parts] Control Center budget constraints do not allow them to pay [relocation expenses] except in manpower shortage occupations.

Mr. Goodyear has pursued his claim with this Office on the basis that his transfer resulted from an impending separation due to a reduction-in-force such as is considered by Federal Travel Regulations (FPMR 101–7) para. 2–1.5d(1) (May 1973), so as to be entitled to relocation expenses. That paragraph requires that the employee actually have received notice of an involuntary separation in order for his transfer to be considered in the Government interest. Since there is no indication that Mr. Goodyear was ever formally notified that he would be separated incident to the proposed closure of the Marine Corps Supply Activity, FTR para. 2–1.5d(1) is not applicable.

The record before this Office does not contain a specific finding as to whether Mr. Goodyear's transfer was in the interest of the Government or for his convenience. Such a finding is required by FTR para. 2–1.3, which provides:

> When change of official station or other action described below is authorized or approved by such official or officials as the head of the agency may designate, travel and transportation expenses and applicable allowances as provided herein are payable in the case of (a) transfer of an employee from one official station to another for permanent duty, *Provided That:* the transfer is in the interest of the Government and is not primarily for the convenience or benefit of the employee or at his request. * * *

That section, insofar as it relates to this case, requires the payment of travel and transportation expenses and applicable allowances for authorized or approved changes of station unless there is a finding that the transfer is primarily for the convenience or benefit of the employee or at his request. Applicable decisions of this Office set forth guidelines to assist agencies in making such determinations. For instance, in B–185077, May 27, 1976, three rules with regard to such determinations read as follows:

> [1] If an employee has taken the initiative in obtaining a transfer to a position in another location, an agency usually considers such transfer as being made for the convenience of the employee or at his request, [2] whereas, if the agency recruits or requests an employee to transfer to a different location it will regard such transfer as being in the interest of the Government. [3] Of course, if an agency orders the transfer and the employee has no discretion in the matter, the employee is entitled to reimbursement of moving expenses.

The Navy's statement, that "budget constraints" did not at that time permit payment of relocation expenses except in manpower shortage categories, misconstrues the purpose and scope of the requirement to make a determination as to whether a particular transfer is in the interest of the Government. The requirement in FTR para. 2–1.3 refers to determining whether or not the *transfer* is in the interest of the Government. No provision is made to permit such determination, in effect, to be predicated on the cost of relocation expenses. In summary, the regulations require a determination as to Government interest. That decision determines entitlement to reimbursement. Thus, "budget constraints" cannot form the basis for denying an employee relocation expenses if his transfer has been found to be in the Government's interest.

In Mr. Goodyear's case, this Office concurs with the Navy's denial of relocation expenses. It appears that upon learning of the possible closure of the Marine Corps Supply Activity, Mr. Goodyear applied for a position at the Navy Ship Parts Control Center. Thus, since he took the initiative in obtaining a transfer, he would come under the first rule stated in B–185077, *supra*, quoted above, and the transfer would be considered as being for his convenience.

Accordingly, the settlement of the Claims Division denying Mr. Goodyear's claims is sustained.

[B-187645]

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Formula

Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria.

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Auction Technique Not Indicated

Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique.

Appropriations—Augmentation—Contract Administration Costs—Allegation Not Sustained By Record

Allegation that agency's incurrence of additional contract administration costs because of contractor's deficiencies in one area would constitute an improper augmentation of appropriations cannot be sustained where record does not indicate that funds appropriated for procurement purposes will be supplemented by funds appropriated for other purposes.

Contracts—Negotiation—Offers or Proposals—Qualifications of Offerors—Experience

Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration.

Contracts—Negotiation—Requests for Proposals—Protests Under—Timeliness

Issue first raised 4 months after protest was filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits.

In the matter of the Bunker Ramo Corporation, June 15, 1977:

Bunker Ramo Corporation (BR) protests the award of a contract to Datacom, Inc. for a Data Gathering and Processing System (DGPS) at the Navy Underwater Tracking Range, St. Croix, Virgin Islands.

Although a number of subsidiary issues have been raised, the thrust of the BR protest is that the Navy departed from the solicitation provisions by awarding on the basis of price instead of technical superiority as emphasized in the solicitation.

Request for proposals (RFP) No. N00406-76-R-0578 was issued on May 11, 1976, and six offers were received. The evaluation criteria included in the RFP were as follows:

1.7 Evaluation of all submitted proposals will be in accordance with the evaluation criteria shown in Section D of this solicitation. "Technical Evaluation Criteria and Checklist." The maximum available points are 1000. They are divided in seven areas as shown in 1.9 below. Thereafter technically qualified proposals will be evaluated with regard to submitted cost proposals.

1.8 *EVALUATION CRITERIA AND THE BASIS FOR AWARD*

The contract resulting from this solicitation will be awarded to that responsible Offeror whose offer, conforming to the solicitation, is determined most advantageous to the government, Cost and other factors considered. The offeror's proposal shall be in the format prescribed by, and shall contain a response to each of the areas identified in the Statement of Work and Section D, paragraph 1.1 through 1.7 above. The evaluation factors are listed in descending order of importance in para 1.9 below.

1.9 Technical Evaluation Factors (Relative Importance). The technical proposal must give clearly and in detail sufficient information to enable evaluation based on factors listed below. Such factors will be weighted, along with cost and price, for evaluation in the following order of importance.

I. TECHNICAL (IAW Statement of Work)
II. INTEGRATED LOGISTIC SUPPORT (ILS) (IAW Statement of Work)
III. SOFTWARE (IAW Statement of Work)
IV. ADMINISTRATION & MANAGEMENT (IAW Statement of Work)
V. SAFETY (IAW Statement of Work)
VI. MAINTAINABILITY (IAW Statement of Work)
VII. OTHER INCLUDING COST AND COST REALISM.

1.10 *COST, INCLUDING COST REALISM:* Although cost is the least important evaluation factor, it is an important factor and should not be ignored. The degree of its importance will increase with the degree of equality of the proposals in relation to the other factors on which selection is to be based. Furthermore, costs will be evaluated on the basis of cost realism. Cost realism pertains to the offeror's ability to project costs which are reasonable and which indicate that the offeror understands the nature of the work to be performed.

The 1,000 points specified as the maximum available were not further allocated in the RFP to the categories listed for consideration.

Prior to the receipt of proposals for evaluation points were assigned to the general categories as follows:

Technical	300
Integrated Logistics Support (ILS)	230
Software	220
System Technical Documentation	90
Management	110
Safety	50

Each category was further broken into subcategories with points assigned to individual considerations within a subcategory. For example, the ILS area had 6 subcategories and 21 individual items for consideration.

In addition, the evaluation plan (not the RFP) contained a trade-off formula which weighted technical scores at 90 percent and cost at 10 percent to arrive at an "evaluation factor" in the following manner:

Evaluation Factor=(Points Scored/Maximum Score) .9+
(Low Cost/Offer Cost) .1

Evaluation of the six proposals received yielded the results as follows:

Offeror	Average Technical Score	Trade-Off Score	Price Proposal
Bunker Ramo	823	.970	$1,471,829
Electrospace Systems, Inc	816	.966	1,139,215
Operting Systems, Inc	759	.926	1,044,475
Datacom, Inc	755	.920	837,571
C-3	543	.700	972,860
Metric Systems	533	.697	1,303,988

BR reduced its price prior to negotiation (to $1,199,934), as did Operating Systems (to $940,152). After initial evaluation, Metric Systems and C-3 were excluded from the competitive range for the purpose of negotiation.

According to the contracting officer, technical discussions were held with all offerors determined to be within the competitive range during the week of August 13, 1976. Technical scores were apparently not modified after these discussions, although it is reported that the technical deficiencies noted in the original technical evaluation were discussed with all offerors responding favorably, and that as a consequence all offerors had "satisfactorily demonstrated an ability to perform." Offerors were also requested to price previously unpriced provisioning items on a not-to-exceed basis. Best and final offers were requested on October 1, 1976, with the following result:

Offeror	Price	Trade-Off Score
Bunker Ramo	$1,207,050	.972
Electrospace Systems, Inc	1,079,655	.973
Operating Systems, Inc	989,012	.918
Datacom, Inc	875,417	.926

The Navy concluded that no offeror within the competitive range had a "decided technical advantage" over any other offeror and that price was thus the determinative factor. It was decided that the "technical difference" reflected in the scoring could be primarily related to the advantage Electrospace Systems, Inc. (ESI) [and BR] had in the ILS area because of previous experience, but that Datacom would

overcome that advantage by virtue of the Navy's working more closely with it in the ILS area during contract administration. The Navy estimated that the additional costs of contract administration would be approximately $35,000, substantially less than the more than $200,000 difference requested by the higher priced offerors.

The Navy then decided it was appropriate to advise offerors that price had become the determinative factor in the award of the contract and to request a second round of best and final offers on that basis. Only ESI chose to modify its offer and reduced its price to $969,999. BR, having protested on October 12, 1976 any award based on lowest cost, took exception to the latter request for best and finals by telex dated October 20, 1976, but reaffirmed its original best and final offer. Award was made to Datacom on November 1, 1976, in accordance with Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(3)(iii) (1975 ed.), which provides that award shall not be made until the protest is resolved, unless the contracting officer determines that "a prompt award will be otherwise advantageous to the Government."

A. Adherence to Evaluation Criteria

BR asserts that the decision to award on the basis of price was improper because the RFP emphasized technical considerations in the evaluation of the proposals. BR states that the 90 percent technical, 10 percent cost trade-off formula (set forth above) appropriately reflected that emphasis and should have been adhered to by the Navy. In this regard BR states that prior to submitting its proposal it discussed the proposal evaluation criteria with the contracting officer, and as a result learned of the trade-off formula, and consequently decided to compete only because of the heavy weight given to technical factors versus cost. According to BR, it regarded the formula as consistent with the RFP provisions with respect to the importance of cost as a factor as the degree of equality of the technical proposals increased.

BR further asserts that its and ESI's technical and management proposals were considered to have scored "very high," that the two proposals not within the competitive range were considered "very low," and that therefore it and ESI were "high" as compared to Operating Systems, Inc. (OSI) and Datacom. Accordingly, BR takes strong issue with the Navy's finding that the technical evaluation scores did not reflect a significant technical advantage in the BR and ESI proposals. BR argues that Datacom's proposal particularly was deficient in the ILS area and that the agency's acceptance of those deficiencies was contrary to the requirements of the solicitation.

As we have previously noted, neither the 90 percent technical, 10 percent cost trade-off formula nor the points assigned to each "technical" category was contained in the RFP. The solicitation only noted that the order of importance of each category in descending order, with cost shown as the least important factor, subject to the proviso that the importance of cost would increase as the equality of competing proposals in the technical areas also increased. Thus, what must first be determined is whether the Navy could reasonably view the Datacom proposal as essentially equal to the BR proposal despite the disparity in the point scoring.

The record in this case shows that approximately 196 individual items were addressed in the various categories requiring the exercise of a subjective judgment by each of the evaluators, with point values for those items ranging between 1 and 80. Our review, after allowing for certain necessary adjustments (such as in the safety category to reflect the total points [50] actually assigned rather than the sum [100 points] of the items shown within the category) further shows there was a substantial variance among the point scores given by the evaluators within identical categories. For example, in the software category, one evaluator rated BR five points (5) higher than Datacom, two gave both parties perfect scores (220), one rated Datacom substantially higher (210 vs. 178), and one, while rating Datacom higher, apparently considered both to be somewhat deficient (143 vs. 130). The same pattern (although not consistent between evaluators) repeats itself in the safety category. In the technical category (weighted at 30 percent of the total), four of the five evaluators rated the Datacom proposal higher, with a 33 point edge in favor of Datacom in one instance. In the ILS area (weighted at about 22 percent) all evaluators considered the BR proposal to be better; however, the point spread again varied widely (from a mere 8 point advantage to one as high as 64 points). The total averaged point scores gave BR a 52 point lead (831 vs. 779) or a "grade" of 83.9 percent opposed to Datacom's 78.7 percent. However, Datacom was higher rated in those categories worth 52.5 percent of the total score with BR scored higher in categories valued at 47.3 percent of the total.

We believe this review points up the basis for our view that numerical point scores, when used for proposal evaluation, are useful as guides to intelligent decision-making, *see* 52 Comp. Gen. 686 (1973), but are not themselves controlling in determining award, since it is apparent that averaged scores may reflect the disparate, subjective and objective judgments of the evaluators. Thus, it has consistently been our position that whether a given point spread between competing offerors alone may indicate the significant superiority of one proposal

over another depends on the facts and circumstances of each procurement and that while technical point scores and descriptive ratings must of course be considered by source selection officials, such officials are not bound thereby. *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), 75-2 CPD 168; *Grey Advertising, Inc.*, 55 Comp. Gen. 1111, 1119-21, 76-1 CPD 325.

We do not find the Navy's judgment that the Datacom proposal was essentially equal technically to the BR and ESI proposals to be other than rational. The point spread itself, of course, was clearly not of a magnitude to compel the conclusion that the Datacom proposal was significantly inferior. *See Grey Advertising, supra*, and cases cited therein. Further, although BR suggests that the ILS portion of the Datacom proposal was worth "essentially zero," the record shows that the evaluators, while rating the Datacom proposal lower in varying degrees in the ILS area when compared with the ratings given the BR and ESI proposal, did not view that proposal as worthless, and in fact gave it substantial scores. (In this regard, we point out that it is not our function to evaluate proposals or to make an independent judgment as to the precise numerical scores which should have been assigned each proposal. *Automatic Laundry Company of Dallas*, B-185920, July 13, 1976, 76-2 CPD 38.) Moreover, in *Grey Advertising, supra*, we recognized that source selection officials may consider a numerical scoring advantage which they find is based primarily on the advantages of incumbency as not indicating a significant technical advantage which would warrant paying substantially more for it.

Here, the Navy's conclusion that Datacom's lower score was due primarily to deficiencies in the ILS area and that those deficiencies were essentially a reflection of the firm's lack of experience in that area appears to be reasonable and is not contradicted by anything in the record. The Navy's further conclusion that those deficiencies, rather than indicating a fundamental weakness in Datacom's proposal, were of the kind that could be handled administratively after award, is also uncontradicted by the record. Thus, we cannot say that the Navy's overall conclusion that the point scores did not indicate an advantage warranting the expenditure of an additional $324,000 because the competing proposals were essentially technically equal is without a rational basis.

Once the proposals could be viewed as essentially equal technically, it was incumbent upon the contracting officer to consider cost. Indeed, in view of the provisions of 10 U.S.C. 2304(g), which require that price be considered in the award of all negotiated contracts, he would have been remiss had he not done so. *Grey Advertising, supra*, at 1124. This does not mean that the evaluation criteria were changed or ig-

nored. In any case where cost is designated as a relatively unimportant evaluation factor, it may nevertheless become the determinative factor when application of the other, more important factors do not, in the good faith judgments of source selection officials, clearly delineate a proposal which would be most advantageous to the Government to accept. *See*, e.g., *Grey Advertising*, *supra*, at 1124 and cases cited therein. As we said recently in *Computer Data Systems, Inc.*, B-187892, June 2, 1977, 77-1 CPD 384:

> The designation of cost or price as a subsidiary evaluation factor means only that, where there is a technical advantage associated with one proposal, that proposal may not be rejected merely because it carries a higher price tag. It does not mean that when technical proposals are regarded as essentially equal, price or cost is not to become the controlling factor.

In any event, no offeror in this procurement can complain of being misled on this point since the RFP explicitly stated that the importance of cost would increase as the technical equality of proposals increased. Moreover, the contracting officer reopened negotiations and afforded offerors the opportunity to submit new best and final offers on the announced basis of cost as the new determinative criterion for award.

With regard to BR's assertion that it was informed of the trade-off formula to be used and therefore was misled when selection was not based on application of that formula, we point out that there was nothing in the RFP itself to suggest that any particular formula would be applied, and the Navy denies that the contracting officer disclosed the precise weights to be accorded cost and technical factors. The Navy acknowledges that prior to the receipt of proposals, BR sought information as to how evaluations were to be conducted, and that they were advised that:

> * * *[t]he exact percentages that might be applied as a formula had not yet been determined but would be established prior to the receipt of offers; that all offerors would be scored on a maximum of 1,000 points and that a formula would be applied in a "trade-off" basis with a percentage for technical score and a percentage for cost. He [the contracting officer] further advises that BR asked what percentage might be used for technical and what percentage for cost and that BR was not told the precise percentage but example figures such as 90%/10% and 80%/20% were used only for illustrative purposes. He advises that several times he repeated that the percentages were examples only and should not be used for working up the decision to offer or not to offer.

Even if we were to assume, *arguendo*, that the Navy's statement is inaccurate and that BR had obtained the precise formula from some source within the Navy prior to the proposal submittal, BR would be be in no position to insist that the Navy adhere to that unpublished evaluation formula and would run the risk that the formula would be changed so long as the change was consistent with the published criteria available to all competitors.

B. Second Request for Best and Final Offers

Protester asserts that the Navy's request for second best and final offers after price became the determinative factor in the award constituted an auction technique prohibited by ASPR § 3.805.3(c).

An auction technique usually arises when there has been an improper disclosure of an offeror's identity and/or the contents of a competing proposal during an on-going negotiated procurement. There is no evidence to suggest that such improper disclosure occurred in this case. Although an unjustified call for new best and final offers could constitute an auction technique, we have often pointed out that requests for additional rounds of best and final offers do not *per se* indicate the existence of an auction. See *Bell Aerospace Company*, *supra*, and cases cited therein. Moreover, here we think it clear that the Navy had an adequate reason for requesting another round of best and finals. Accordingly, we see no merit in protester's contention that an auction existed.

C. Misuse of Appropriated Funds

Protester asserts that $35,000 in contract administration costs which the Navy estimates may be incurred in working more closely with Datacom in the ILS area is a misuse of appropriated funds as an "unauthorized augmentation of appropriations for procurement by the Navy."

The use of appropriated funds is limited by statute to the purposes for which the funds were appropriated. 31 U.S.C. 628. The general rule is, therefore, that when a specific appropriation has been made for all necessary expenses incident to a Government activity, all expenditures for such purpose must be made from such appropriation absent express authority to the contrary. 26 Comp. Dec. 43, 45 (1919). There is nothing in the record from which to conclude that the agency is or may supplement the appropriation obligated for the procurement in question with funds appropriated for another purpose.

D. Award in Anticipation of Deficient Performance

Protester asserts that the contract was awarded in anticipation of deficient performance and for less than was required by the solicitation, with the result that the contract award was improper. We understand BR to be referring to Datacom's lack of experience in the ILS area. Datacom, however, took no exceptions to the ILS specification, and Datacom's contract requires no less than that required by the RFP. We do not view Datacom's lower score in ILS as evidence of an inability to perform any more so than BR's less than perfect scores

would indicate an inability on the part of that firm. The fact that Datacom may have been relatively weak in the ILS area does not mean that Datacom cannot or is not expected to perform in accordance with minimum agency requirements. There is no merit to BR's argument.

E. Not-to-exceed Pricing Request

The protest was filed on October 13, 1976. In comments filed by letter dated February 11, 1977, the protester for the first time raised the issue of the propriety of requesting not-to-exceed prices for previously unpriced provisioning items. The agency request for not-to-exceed prices was made on September 21, 1976. There is no record of any protest raised by BR at the time of the request or within the time allowed by section 20.2(b)(1) of our Bid Protest Procedures, which states:

> * * * In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 20.2(b)(1) (1977).

The next closing date for the receipt of proposals following incorporation of the not-to-exceed price request was October 1, 1976. Therefore, inasmuch as that issue has not been timely filed, it will not be considered on its merits.

F. Award Pending Protest

BR objects to the award of the contract notwithstanding the protest with this Office, and disputes any finding of urgency related to the scheduled reduced operations at the St. Croix range during August 1977, asserting that underwater tracking range schedules change frequently. The Navy's finding that the prompt award would be otherwise advantageous to the Government, is grounded upon the scheduling of the Atlantic Fleet training schedules which it is stated is "done almost one year in advance." While we recognize that training schedules may be modified for fleet operational reasons, protester has not produced any evidence to suggest that the modification of training schedules can readily be modified without serious and costly impact on the fleet's operations. We are therefore unable to conclude that the contracting officer's finding that a prompt award would be advantageous to the Government was in error. *What-Mac Contractors, Inc.; Chemical Technology, Inc.*, B-187053(1), November 19, 1976, 76-2 CPD 438.

The protest is denied.

[B-188444]

Contracts—Negotiation—Evaluation Factors—Method of Evaluation—Technical Proposals—Architect-Engineer Contracts

Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits.

Contracts—Architect, Engineering, etc., Services—Award Board *v.* Technical Board Selection—Timing of Report Documenting Reversal

Noncontemporaneous timing of report documenting reversal of priority of negotiation selections of technical board by awards board delegated authority of agency head to make final selection for negotiation of architect-engineer contract does not affect substance of justification where proper basis for negotiation priority existed. In any event noncontemporaneous report essentially elaborated on reasons for priority already in contemporaneous report.

Contracts—Architect, Engineering, etc., Services—Evaluation Boards—Private Practitioners—Federal Procurement Regulations Requirement

Federal Procurement Regulations para. 1-4.1004-1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence.

In the matter of SRG Partnership, PC, June 17, 1977:

SRG Partnership, PC (SRG) protests the decision of the Forest Service to negotiate a contract with another firm for architect-engineer work for the Timberline Day Lodge in Mt. Hood National Forest, Oregon. The contract is a small business set-aside for firms in the State of Oregon. The contract was negotiated under the provisions of Federal Procurement Regulations (FPR) § 1-4.1000, *et seq.* (1964 ed. amend. 150). The estimated cost for the project is $3 million.

Two boards were set up pursuant to FPR § 1-4.1004-1(a), the Architect-Engineer Technical Evaluation Board (the technical board) and the Board of Contract Awards (the awards board). The awards board was delegated the authority of FPR § 1-4.1004-4, as follows:

(a) The agency head (or the responsible official to whom the authority has been delegated) shall review the recommendations of the architect-engineer evaluation board and shall, in concert with appropriate technical and staff representatives, make the final selection, in the order of preference, of the firms considered best qualified to perform the work. Should that final selection of the best qualified firms be other than as recommended by the architect-engineer evaluation board, the agency head shall provide a complete written documentation of his decision which shall become a part of the contract file.

(b) The agency head or his authorized representative shall inform the board of his decision which will serve as an authorization for the contracting officer to commence negotiation.

The delegation of authority letters to the chairman of each board refer to and discuss the division of responsibility set forth in the regulation.

The technical board began meeting on January 13, 1977, to evaluate the proposals received as a result of the Forest Service advertisement in the Commerce Business Daily. Thirty-two proposals were received. The technical board began by eliminating those which were obviously not top contenders; 12 firms were eliminated on this basis. The remaining 20 were evaluated on the basis of the evaluation criteria set forth in FPR 1–4.1004-3, namely: (1) technical competence and specialized experience, (2) past performance, (3) familiarity with the area and with the people flow in mountain recreation situations, and (4) capacity to perform. Since capacity to perform had been initially evaluated on the first cut, primary emphasis in evaluating the 20 remaining firms was on the other three criteria. These three criteria were broken down into many subcriteria with each weighted according to its importance. The rankings of the firms resulted in the selection of four remaining firms to be considered. Among these were Broome, Oringdulph, O'Toole, Rudolf & Assoc. (BOOR) and SRG.

On January 18 and 20, 1977, the technical board met with the awards board to discuss the selection procedures up to that point; at that time, the awards board discussed with the technical board some pertinent information to be developed during the interview process. The technical board then interviewed the four firms.

After the last firm was interviewed, the technical board met on January 25 to discuss the four firms and to develop a ranking of the firms. All agreed on the ranking of the fourth firm. Because there was no consensus as to how to rank the remaining three firms, the board listed the pros and cons for each. The results of that listing were later presented to the awards board. On January 26, the technical board agreed upon the third choice, but it could not agree on the first and second choices between BOOR and SRG. According to a memorandum from the technical board to the awards board:

* * * We could not, however, determine which of the remaining two firms (SRG Partnership & BOOR), we would rate as our first choice and our second choice for the daylodge contract. The members of the Technical Evaluation Board agreed that either of the two firms was very competent, had many desirable features, and would most likely perform the A-E contract in a very satisfactory manner. * * *

Since it was obvious we were not going to come to a consensus, the Chairman of the Technical Evaluation Board requested a secret ballot. * * * It then shows that between firm 3 and firm 4, three members of the board felt firm 4 (SPG) should be first choice in negotiations for the A-E contract; and firm 3 (BOOR) should be our second choice. This ranking is based strictly on a democratic voting process, since the members of the Technical Evaluation Board could not come up with any consensus of agreement on a number 1 and number 2 choice.

On the afternoon of January 26, the technical board presented for 2 to 3 hours the results of the selection process to the awards board, including a report on the closeness of its decision. All materials developed and used by the technical board were given to the contracting officer and made part of the contract file.

On January 27, the awards board met to consider a tentative final ranking of the firms. Two available members of the technical board were present a portion of the time to answer questions. Because of the closeness of the technical board's decision between SRG and BOOR, the awards board decided to again review the criteria. The board referred back to the four basic criteria for negotiation selection mentioned above set forth in FPR § 1–4.1004–3. The board members then separately ranked the firms in order of preference using their own method of ranking against the criteria. They found that they were unanimous in selecting BOOR as their first choice; two of the three members ranked SRG second, while one member ranked SRG third.

The thrust of SRG's protest is that the reversal of the rankings was arbitrary and capricious and was an unauthorized extension of authority.

SRG argues that the Federal Procurement Regulations restrict the awards board to perform a review function that cannot reverse the technical board without complete written documentation that can substantiate due cause and justification to question that decision. We do not read FPR § 1–4.1004–4 as precluding the awards board from reversing the ranking unless the decision is clearly erroneous or has no basis for support. We interpret the regulation as requiring an independent evaluation function with appropriate technical and staff representatives assisting in making the final selection. See B–187585, *Industrial and Systems Engineering, Inc.*, April 22, 1977, 77–1 CPD 278. Where the recommendation of the technical staff is as close as the ranking of SRG and BOOR, the importance of the independent exercise of judgment by the awards board increases.

Our review is limited to deciding whether the record reasonably supports a conclusion that the selection was rationally founded. *Tracor Jitco*, 54 Comp. Gen. 896 (1975), 75–1 CPD 253, *reconsidered*, 55 Comp. Gen. 499, 75–2 CPD 344. We have frequently held that it is not our function to make independent evaluations of proposals to determine which offer should have been selected for award, that the determination of the relative merit of technical proposals is the responsibility of the procuring activity concerned which must bear the major burden of any difficulties encountered because of defective analysis, and that the procuring activity's determination will ordinarily be accepted by our Office unless it is clearly shown to be unreasonable. See *Gloria G. Harris*, B–188201, April 12, 1977, 77–1 CPD 255.

The awards board's rationale for selection was, as follows:

> The Board of Contract Awards concurs with your preference rankings #3 and #4, but disagrees with your #1 and #2 rankings. This board by using the evaluation criteria in 1-4.1004-3 of the Federal Procurement Regulations determined that Broome, Oringdulph, O'Toole, Rudolf & Associates should be ranked #1 and SRG Partnership should be ranked #2. Broome, Oringdulph, O'Toole, Rudolph & Associates has an excellent past performance record in the area of cost controls, and quality of work. This firm has significant facility construction experience as evidenced by their form 255. Staffing and organization of the firm provides for very good in-house construction management capabilities.

Arguing that the decision of the awards board is unreasonable, SRG contends that the reasons stated by the board for reversing SRG's and BOOR's rankings could apply to any of the final four firms being considered. However, SRG admits that (1) it does not have in-house construction project management; (2) BOOR is an older and substantially larger firm with a much greater list of completed projects; and (3) BOOR does have experience in at least two projects similar to the Day Lodge, while SRG has none. We, therefore, find that the record reasonably supports the conclusion that BOOR's and SRG's rankings were rationally founded and reflected a valid exercise of discretion required by the applicable regulation.

SRG contends that the brief one-page contemporaneous report issued by the awards board on February 4, 1977, to document its reversal of SRG's and BOOR's rankings is not sufficient to satisfy the requirement of FPR § 1-4.1004-4(a) for complete written documentation of the decision. The awards board later issued a report on March 4, 1977, detailing its evaluation process and the basis of its reversal. SRG objects to the timing of this report. In *Tracor, Inc.*, 56 Comp. Gen. 62, 77 and 78 (1976), 76-2 CPD 386, we held that the time of preparation of the report to justify acceptance of a higher-priced, higher-scored offer does not affect the substance of the justification and that a documentation requirement is procedural in nature and does not affect the validity of an award if a proper basis for the award existed. The same principles govern the present situation. We have already determined that, for purposes of our review, a proper basis for the rankings existed; the timing of the awards board report is therefore not determinative of the validity of the decision the awards board reached. The requirement for complete written documentation of the decision is satisfied by the later report of March 4, 1977. In any event, we note that the March 4 report contained essentially an elaboration of the reasons for the reversal already contained in the contemporaneous report of February 4. Moreover, we cannot conclude that the February 4 report was clearly in violation of the regulation.

SRG objects to the fact that no private practitioners were on the boards. FPR § 1-4.1004-1(a) requires that private practitioners be

appointed to the board only if provided for by agency procedures; however, neither the Forest Service nor the Department of Agriculture has issued any regulation pursuant to FPR § 1-4.1004-1(a) to require private practitioners on the board.

Of particular significance, we observe that the awards board recognizes that SRG is considered well qualified to perform the contract and that, if negotiations with BOOR are unsuccessful, SRG would be given the opportunity to negotiate for the contract.

SRG's protest is denied.

[B-187587]

Contracts—Negotiation—Cost-Reimbursement Basis—Evaluation Factors—Cost *v.* Technical Rating

Based on review of Department of Interior's evaluation record evidencing rationale for selection of cost reimbursement contractor, General Accounting Office concludes that rationale is sound notwithstanding allegations that past experience and academic nature of protester ideally suited it to do study in question.

Contracts—Negotiation—Offers or Proposals—Essentially Equal Technically—Price Determinative Factor

Given essential equality of technical proposals, contracting officer's decision to award contract to offeror submitting slightly lower scored, significantly less costly proposal did not give improper emphasis to cost, since decision merely applied common sense principle that if technical considerations are essentially equal, the only remaining consideration for selection of contractor is cost.

Contracts—Negotiation—Offers or Proposals—Deficient Proposals—Contradicting Evidence Not Submitted

Since contracting officer insists that protester "was advised that their proposal was top heavy (too many Ph. D's), with too high number of man-hours," and because protester has not submitted probative evidence contradicting position, adequate discussions were held with company concerning alleged deficiencies.

Interior Department—Contracts—Costs—Analysis—Evaluation Factors

Notations on successful offeror's cost proposal show that Department of Interior complied with minimal regulatory requirements mandating cost analysis as concerns examination of necessity and reasonableness of proposed costs.

In the matter of the Southern California Ocean Studies Consortium, June 20, 1977:

Southern California Ocean Studies Consortium (Ocean Studies) has questioned the award of a contract by the Department of the Interior to Winzler & Kelley, consulting engineers, for a "Summary and Analysis of Environmental Information of [the] Central and Northern California Coastal Zone and Offshore Areas." The main point of

Ocean Studies' protest is that the merit contained in its first-ranked proposal was improperly disregarded in favor of a lower-scored, albeit lower cost, proposal.

Interior does not dispute the protester's allegation that its proposal was ranked first by the technical evaluation committee. Neither does Interior deny that the technical committee recommended that the award be made to Ocean Studies instead of Winzler & Kelley. Interior insists, however, that it made a proper award.

Interior points out that it held discussions with all five offerors who submitted initial proposals under the RFP "in spite of the wide disparities in both scores [ranging from 73.92 to 107.41] and costs [ranging from approximately $211,000 to $363,000]." Thus "on June 18 and 21, 1976, each offeror was called and the proposals and evaluations were discussed in detail, and revised proposals were requested by June 30, 1976."

Interior further explains that the "rating variation" among the three best and final proposals was "only 8.1%." The final scores and proposed costs were:

	Score	Proposed Cost (approximately)
Ocean Studies	118.85	$334,000
Winzler & Kelley	110.93	$211,000
(3rd offeror)	108.23	$247,000

Because of the "closeness of the three top technical scores," Interior further explains, "cost entered into the deliberations" in selecting the successful offeror. The contracting officer explains:

> While cost, in accordance with FPR 1-3.805-2, was not heretofore considered as an evaluation factor (except for evaluating realism of proposed costs and as an evaluation of the offerors' understanding of the effort involved), because of the closeness of the three (3) top technical scores [8.1% difference between first and third], cost entered into the deliberations. Since even the lowest technically ranking offerors had submitted acceptable proposals, and four (4) of the five (5) original offers were for less than $230,000.00, it was deemed that a proposed cost in the $200,000-$250,000 range should properly be considered reasonable.
>
> Therefore, in accordance with FPR 1-3.805-2, which states, "* * * the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government," a decision was made to award the contract to Winzler and Kelley for a total estimated cost plus fixed fee of $211,365.

Ocean Studies has taken exception to this position. The association says that the emphasis given to the lowness of the successful offeror's proposed costs in selecting Winzler & Kelley was arbitrary and ran counter to the directive in Federal Procurement Regulations (FPR) § 1-3.805-2 (1964 ed. circ. 1) that estimated costs shall not be controlling in selecting a contractor for the award of a cost-reimbursement

contract. Ocean Studies' further arguments may be summarized as follows:

(1) An academic institution of the type represented by Ocean Studies is best suited to carrying out the subject study;

(2) The past experience of Ocean Studies makes it ideally suited to carry out the study;

(3) The contracting officer acted improperly in disregarding the technical evaluation committee's analysis;

(4) When the contracting officer discussed Ocean Studies' proposal with the association he should have conveyed precisely the areas of the proposal needing improvement—especially as to any area in which Ocean Studies' proposed effort was deemed excessive;

(5) The analysis of the successful offeror's cost proposal was not as thorough as the review made of Ocean Studies' proposal and, because of the lack of detail concerning the degree of effort in the successful offeror's technical/management proposal, Interior "cannot be sure exactly how much will be done for the lower bid [of Winzler & Kelley]."

The award of negotiated contracts in general and the award of negotiated cost-reimbursement contracts in particular necessarily involve a considerable range of administrative discretion. Unlike the award of advertised contracts, there are no statutes or regulations specifying the precise method of determining the successful offeror for a given procurement.

Given the wide-ranging discretion accorded agencies in selecting the successful offeror in a negotiated procurement, it is not surprising that challenges are frequently advanced by unsuccessful offerors against awards of negotiated contracts. If it is not surprising that challenges are frequently mounted against these awards, it should also not be surprising that our Office has been extremely circumspect in sustaining these challenges. As we stated in *Tracor Jitco, Inc.*, 54 Comp. Gen. 896, 898 (1975), 75-1 CPD 253:

Tracor asserts that it should have received award because its higher-rated technical proposal represented greater value than Southwest's offer. Similar complaints, questioning agency decisions in weighing cost/technical "trade-offs," have been considered by our Office in recent years. See, for example, *Matter of ILC Dover*, B-182104, November 29. 1974; 52 Comp. Gen. 686 (1973); 51 *id.* 678 (1972); B-170181, February 22, 1971; 50 Comp. Gen. 246 (1970). Uniformly, we have agreed with the exercise of the administrative discretion involved—in the absence of a clear showing that the exercised discretion was not rationally founded—as to whether a given technical point spread between competitive-range offerors showed that the higher-scored proposal was technically superior. On a finding that technical superiority was shown by the point spread and accompanying technical narrative, we have upheld awards to concerns submitting superior proposals, although the awards were made at costs higher than those proposed in technically inferior proposals. 52 Comp. Gen. 358 (1972); B-171696, July 20, 1971; B-170633, May 3, 1971. Similarly, on a finding that the point score and technical narrative did not indicate superiority in the higher-ranked proposal, we

have upheld awards to offerors submitting less costly, albeit lower-scored technical proposals. See 52 Comp. Gen. 686 (1973); 50 *id., supra*. This reflects our view that the procuring agency's evaluation of proposed costs and technical approaches are entitled to great weight since the agencies are in the best position to determine realism of costs and corresponding technical approaches. *Matter of Raytheon Company*, 54 Comp. Gen. 169 (1974); 50 *id.* 390 (1970). Our practice of deferring to the agency involved in cost/technical trade-off judgments has been followed even when the agency official ultimately responsible for selecting the successful contractor disagreed with an assessment of technical superiority made by a working-level evaluation committee. See B-173137(1), October 8, 1971. Our review of the subject award, therefore, is limited to deciding whether the record reasonably supports a conclusion that the award was rationally founded. See *Matter of Vinnell Corporation*, B-180557, October 8, 1974.

Based on our review of the entire evaluation record, we find the contracting officer's judgment that the top three proposals were essentially equal from a technical view to be rationally founded notwithstanding Ocean Studies' views that: (1) its past experience and academic nature should have characterized its proposal as superior; and (2) possible uncertainty exists as to the level of effort to be expended by the contractor. This finding is prompted, in part, by the detailed examination made by the Department into all phases of the technical/management proposals in question--the record of which demonstrates, in our view, the quality of the top three proposals.

Given the essential equality of technical proposals, the contracting officer's decision to then award the contract to Winzler & Kelley based on the lower costs contained in the association's proposal did not give improper emphasis to cost. This decision merely applied the common sense principle that if technical considerations are essentially equal the only remaining consideration for the selection of a contractor is cost.

Considering Ocean Studies' argument that it was not given enough hints as to how its proposal might be improved, the contracting officer insists that the company "was *advised* of the Government's feeling that their proposal was top heavy (too many Ph.D's), with too high a number of man-hours." Because of this position, and since Ocean Studies has not submitted probative evidence to the contrary, we do not agree that the discussions held with the association were inadequate.

Finally, the Department insists that it adequately assessed the realism of the proposed costs of Winzler & Kelley's proposal and those contained in all submitted proposals. As explained by the contracting officer:

A cost analysis was performed in conjunction with the technical evaluation. This analysis is recorded in the notes made by the Contracting Officer on the cost proposals themselves. see Tab C. A telephonic check with the Defense Contract Audit Agency (DCAA) was made of Winzler & Kelley's proposed labor, overhead, and G&A rates on September 1, 1976. The cost analysis plus the discussions with the technical committee indicated that the SCOSC cost proposal was quite high

because of the large number of hours proposed and because of the use of higher priced personnel than were needed. These facts were relayed to SCOSC during the negotiation process.

The notations on Winzler & Kelley's cost proposal show that the Department did question various items of proposed consultant costs. The number of items questioned was fewer than the items questioned in Ocean Studies' proposal, however.

The numerical discrepancy and the quoted narrative suggest, as Ocean Studies urges, that the cost analysis made of Winzler & Kelley's proposal was less thorough than the analysis made of Ocean Studies' costs. Nevertheless, since some of the successful offeror's costs were questioned, we cannot conclude that the Department failed to comply with the minimal requirements of costs analysis found in FPR § 1–3.807–2(c) (1964 ed. amend. 103) which requires, among other things, the examination of the "necessity for certain costs" and the "reasonableness of amounts estimated for the necessary costs." Ideally, the costs should have been examined in considerably more depth in order to arrive at a valid *should cost* estimate for the proposal (in accordance with the cited regulation) especially since award was being contemplated to the company. Recognizing that Winzler & Kelley's proposed costs were more than $100,000 less than Ocean Studies' proposed costs, we consider it extremely unlikely that an in-depth cost analysis would narrow the cost difference such that the Department's current technical/cost tradeoff analysis would be changed. Nevertheless, we are recommending that the Department ensure that detailed *should cost* estimates are made in future procurements.

Protest denied.

Although we denied the protest, we note that the only guidance furnished offerors about the relative importance of cost was an RFP statement that "cost, as an award factor, shall be treated in accordance with the Federal Procurement Regulations, paragraph 1–3.805–2." This statement—which incorporates the cited paragraph's general exhortations that offerors' proposed costs shall not be considered as controlling and that a cost-type contract is to be awarded to the Government's best advantage—gave no indication as to the relative importance of cost as an award factor, compared with the specific technical factors described in the RFP.

Even though the RFP's failure to list the relative importance of cost compared with the specific technical factors was not prejudicial to any offeror given the essential equality of technical proposals, we are bringing the deficiency to the attention of the Secretary of the Interior.

[B-188959]

Contracts—Protests—Persons, etc., Qualified to Protest—Interested Parties—Potential Subcontractors Excluded

Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed.

In the matter of Elec-Trol, Inc., June 20, 1977:

Elec-Trol, Inc. (Elec-Trol) protests award of a contract to anyone other than F&M Systems, Inc. (F&M) under solicitation No. N62467-76-B-0356, issued by the Naval Facilities Engineering Command, Charleston, South Carolina, for an energy control and monitoring system.

Elec-Trol, a potential subcontractor, contends that under its interpretation of the solicitation clause entitled "Additive or Deductive Items," F&M's bid should have been evaluated as lower than the bid submitted by Honeywell, Inc., the firm to which the Navy proposes to make award. Elec-Trol, however, did not submit a bid under the instant solicitation, and it was not named as a proposed subcontractor in the bid submitted by F&M. There was no provision in the solicitation for Government approval of subcontractors and F&M has not joined in this protest.

Our Bid Protest Procedures require that a party be "interested" in order that its protest may be considered. 4 C.F.R. § 20.1(a) (1975). In determining whether a protester satisfies the interested party criterion, consideration is given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. *Kenneth R. Bland, Consultant*, B-184852, October 17, 1975, 75-2 CPD 242. This serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the merits of a challenged procurement may be decided.

Elec-Trol claims to be interested in this matter by virtue of its expectation that it will be chosen as a subcontractor to F&M if that firm is awarded the prime contract. In our view, this is too tenuous a basis for claiming recognition as an interested party, particularly where the right being asserted by Elec-Trol—F&M's right to be declared low bidder—is likely to be most zealously protected by F&M itself. Furthermore, it is significant that no rights would vest in Elec-Trol by virtue of a successful protest since it would have no cognizable right to a subcontract award in the event that F&M was awarded the contract. The case is similar to that of *John S. Connolly, Ph.D.*, B-188832, B-188846, May 23, 1977, 77-1 CPD 359, in which we declined to develop the bid protest of a potential employee of an unsuccessful offeror where the offeror did not file a protest. In such cases, we recognize an

offeror's right to allow its offer to expire and to commit its resources elsewhere in reliance on an adverse agency determination. Where, however, there is a possibility that recognizable interests will be inadequately protected if our bid protest forum is restricted solely to offerors in individual procurements, we have recognized the rights of non-offerors, including subcontractors, to have their protests considered on the merits. Abbott Power Corporation, B–186568, December 21, 1976, 76–2 CPD 509, District 2, *Marine Engineers Beneficial Association—Associated Maritime Officers, AFL–CIO*, B–181265, November 27, 1974, 74–2 CPD 298; B–177042, January 23, 1973, 49 Comp. Gen. 9 (1969). For example, we would review a protest by a potential flooring subcontractor concerning the flooring specification. However, we would dismiss a flooring subcontractor's protest concerning the rejection of the prime contractor's bid as nonresponsive to the roofing specifications. We have also recognized the right of a subcontractor to protest a prime contract award where the subcontractor's financial or other interest is evident from the fact that the protester is listed as a proposed subcontractor and the potential prime contractor acquiesces in the protest. *Educational Projects, Inc.*, 56 Comp. Gen. 381 (1977), 77–1 CPD 151.

We note that in *Enterprise Roofing Service*, 55 Comp. Gen. 617 (1976), 76–1 CPD 5, we stated that a protester's position as a proposed subcontractor or failure to participate as a bidder does not destroy its entitlement to be considered as an interested party. However, the protester in that case was not shown to be outside the class of persons interested in questioning the eligibility criteria of the solicitation. In other words the protester was in the position of an interested potential bidder and the fact that it may have participated as a proposed subcontractor did not preclude it from questioning the solicitation's eligibility criteria.

In view of the fact that, in the instant case, the protester's financial interest in the relief requested is wholly contingent on factors outside the contract award process and the fact that the bidder has not joined in this protest, we conclude that development and consideration of this matter as a bid protest would serve no useful purpose.

Accordingly, the protest is dismissed.

We note, however, the protester disagrees with the Navy's use of the "Additive or Deductive Items (1968 Apr)" clause (ASPR § 7–2003.28 (1976 ed.)). Specifically, the protester disagrees with the Navy's selection of the low bidder on the basis of items 1, 2 and 4, even though the above cited clause allows for skipping of an additive item if addition of another bid item (e.g., item 3) in the listed order of priority would make the award exceed the available funds and the addition of the next subsequent additive bid item (e.g., item 4) in a

lower amount would not exceed such funds. The effect of protester's interpretation is to permit the determination of the low bidder on a basis different than the work to be performed under the contract. In this connection we note *Floyd Kessler*, B-186594, September 3, 1976, 76-2 CPD 218, wherein we stated that the lowest responsible bidder must be determined based on the work to be let. Consequently, it appears that the protester's interpretation of the subject clause is inconsistent with this general basic rule of procurement law.

[B-183903]

Compensation—Promotions—Temporary—Detailed Employees—Retroactive Application

Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG 1 and WG 2 for custodial employees detailed for extended periods to WG-2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell decisions*, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award.

In the matter of Annette Smith, *et al.*—arbitration award of backpay for excessive details to higher grade positions, June 22, 1977:

I.

This action involves a request dated May 9, 1975, for a decision from the Federal Labor Relations Council (FLRC) as to the legality of paying backpay awarded by an arbitrator in the matter of *General Services Administration, Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO* (Lippman, Arbitrator), FLRC No. 74A-58. The case is before the Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

We regret that we were unable to rule on the legality of this arbitration award on a more timely basis. However, because this case involves excessive detailing of employees to higher grade positions, we found it necessary to delay this decision until after we had reconsidered our decision on that issue in *Everett Turner and David Caldwell*, 55 Comp. Gen. 539 (1975). We so advised the Federal Labor Relations Council by letter of September 29, 1976. Our decision on reconsideration of *Turner-Caldwell* was issued on March 23, 1977, 56 Comp. Gen. 427.

American Federation of Government Employees Local 2456, hereinafter referred to as the union, represents the approximately 2,300 custodial employees and elevator operators employed in the Metropolitan Washington, D.C., area by the Public Buildings Service, Gen-

eral Services Administration (GSA), Region 3, hereinafter referred to as the agency.

On September 12, 1973, the union filed a grievance in its own name and on behalf of Mrs. Annette Smith and all other employees similarly affected. The grievance alleged that the agency had violated certain provisions of the negotiated labor–management agreement in denying increases in pay to an unknown number of employees in the bargaining unit after they were assigned work that entitled them to higher rates of pay. The union requested that the grievance be adjusted by awarding promotions to Mrs. Smith and other similarly situated employees retroactively to the first day they were qualified for such under the provisions of the agreement after having been assigned higher–level duties.

Attempts by the parties to informally adjust the grievance were unsuccessful and the dispute, framed as a class action, was submitted to binding arbitration in accordance with Article 14 of the agreement. The first of a series of hearings was held on January 2, 1974. The arbitrator, with agency acquiescence, adopted the union's statement of the issue, which is as follows:

> Did the Employer violate the Labor-Management Agreement when Mrs. Annette Smith and other employees were assigned higher graded work for long and sustained periods without benefit of promotion?

The facts, as brought out in the arbitration hearings, are as follows. Mrs. Smith is representative of a class consisting of an unknown number of similarly situated employees within the bargaining unit. She was hired by the agency on July 3, 1972, as a wage grade (WG) 1 custodial laborer and assigned zone cleaning duties on the fifth floor of the Pentagon Building. About 3 months later, on October 10, 1972, Mrs. Smith was informally assigned WG–2 toilet cleaner duties in the same building. On January 22, 1973, the agency prepared a Standard Form (SF) 52 officially detailing her to such duties for a 60-day period. Several weeks thereafter, Mrs. Smith inquired whether she was entitled to a promotion and was informed by an agency official that President Nixon had, on December 11, 1972, imposed a freeze on hiring and promotions and therefore the agency was unable to promote her. By its terms, the presidential freeze was scheduled to expire when the administration's budget was transmitted to Congress, which occurred on January 29, 1973. However, many agencies, including GSA, retained certain personnel ceiling restrictions in effect past the expiration date of the presidential freeze. The GSA, by memorandum of February 12, 1973, continued the freeze on hiring and promotions, and it was not lifted until April 2, 1973. Two weeks later, on April 16, 1973, the agency prepared a second SF 52 officially detailing Mrs. Smith to WG–2 duties for another 60-day period.

As a result of budgetary constraints, the Acting Commissioner, Public Buildings Service, on August 8, 1973, imposed a total freeze on all Public Buildings Service hiring, promotions, or reassignment personnel actions. The freeze remained in effect until October 1, 1973. Subsequently, on November 11, 1973, Mrs. Smith was promoted to a WG–2 position. Throughout the period from October 10, 1972, until November 11, 1973, Mrs. Smith had performed WG–2 toilet cleaning duties while being paid as a WG–1.

The union presented evidence concerning 13 employees who had been assigned to higher grade positions for periods in excess of 30 days while being paid their regular rate of pay. The evidence also indicated that, frequently, the agency assigned employees to higher grade positions without processing personnel action documents required for an official detail.

III.

The arbitrator focused his attention on Article 27.9 of the agreement concerning allocation of staffing allowances to provide for substitutes to cover absenteeism. This provision was the result of a compromise that the agency and the union had reached during negotiation of the agreement to insure that staffing levels of custodial workers were maintained at about 20 percent above actual manpower requirements to cover absentees. This was intended to alleviate the need to detail workers to higher grade positions. With regard to the issue of whether the agency maintained appropriate staffing allowances as required by Article 27.9, the arbitrator found that the evidence demonstrated a general pattern of manpower shortages. Therefore, he concluded that the excessive detailing to compensate for manpower shortages resulted largely from the failure to maintain proper staffing allowances.

In reference to whether the presidential freeze and the subsequent agency-imposed freeze on hiring and promotions excused the agency from abiding by the provisions of the agreement, the arbitrator noted that under section 12(a) of Executive Order 11491 only regulations and policies subsequently promulgated by "appropriate authorities" may provide such relief. Since "appropriate" is defined to mean an authority outside of the agency, the arbitrator found that the agency-imposed freeze was not issued by an appropriate authority and, therefore, could not serve to excuse the agency from performance under the agreement. Also, although he found that the freeze imposed by the President was issued by an appropriate authority, he interpreted the presidential freeze as being inapplicable to prior commitments contained in collective-bargaining agreements, such as the staffing allowances provision in Article 27.9.

Moreover, the arbitrator found that the agency had on numerous occasions violated Civil Service Commission regulations governing employee details by assigning employees to perform higher grade duties for extended periods and by not officially recording such details. He also found that the agency had not followed competitive procedures in making details as required by Commission regulations.

The arbitrator found that class action relief was appropriate because the 13 employees who testified or were referred to in the record did not exhaust the class of employees adversely affected by the detailing. Further, he noted that class actions have the advantage of avoiding multiple proceedings and of preserving employee rights to obtain relief that might otherwise become barred by time limitations on presenting grievances under the agreement.

Finally, the arbitrator considered the proper remedy for the excessive use of details resulting from the agency's violation of Article 27.9 of the agreement obligating it to maintain staffing at certain prescribed levels. The arbitrator accepted GSA's argument that he could not grant retroactive promotions because such relief would be a violation of the merit system. However, he concluded that he had authority to grant backpay to employees for performing duties of the next higher grade. Therefore, he directed the agency to compensate Annette Smith, who was detailed prior to the freeze, and other similarly situated employees, in an amount equal to the difference in the rate of pay for WG–1 and WG–2 beginning on the 31st day of the detail until it was terminated. He further determined that employees who were first detailed during the presidential freeze were entitled to backpay commencing with the 61st day of their detail or from the end of the freeze period, whichever occurred sooner. In applying this relief, details were to be cumulated to avoid abuse. The arbitrator gave all employees 60 days to file their claims with the agency for backpay. He retained jurisdiction of the case for the purpose of resolving any impasses that might develop in applying the opinion and award.

IV.

In our recent decisions, we have held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 *id.* 403 (1974), 54 *id.* 435 (1974), 54 *id* 538 (1974), and B–180010, January 6, 1976, 55 Comp. Gen. 629. The Back Pay Act, 5 U.S.C. § 5596 and Civil Service Commission implementing regulations contained in 5 C.F.R. Part 550, sub-

part II, are the appropriate statutory and regulatory authorities for compensating an employee for such violations of a negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 and backpay regulations, there must be a finding that the withdrawal, reduction, or denial of pay, allowances, or differentials was the clear and direct result of and would not have occurred but for the unjustified or unwarranted personnel action. See 5 C.F.R. § 550.803(a), as amended March 25, 1977, 42 Federal Register 16125. See 54 Comp. Gen. 760, 763 (1975) and 55 *id.* 629 (1976), *supra*. Therefore, in order to make a valid award of backpay, it is necessary for the arbitrator to find not only that the negotiated agreement has been violated by the agency, but also that such improper action directly caused the grievants to suffer a loss, reduction or deprivation of pay, allowances, or differentials.

In this case, the arbitrator found that the agency violated the agreement by failing to maintain staffing at prescribed levels which resulted in excessive detailing of employees. Hence, he awarded the employees detailed during the period backpay for performing the higher level duties, but he did not award them retroactive promotions. However, promotion is the *sine qua non* to entitlement to additional pay, for it is a well-settled legal principle that service by a Government employee in an acting capacity does not entitle him to permanently occupy that position nor to receive the salary incident thereto, since his rights and salary are based solely on the position to which he has been officialy appointed. See *Bielec* v. *United States*, 197 Ct. Cl. 550 (1972); *Ganse* v. *United States*, 180 Ct. Cl. 183, 186 (1967). See also 5 U.S.C. § 5535.

At the time the arbitrator made his award on July 19, 1974, there was no mandatory requirement upon an agency to grant a temporary promotion to an employee for an extended detail to a higher grade position. We so held in our decision 52 Comp. Gen. 920 (1973). Also, there was no such requirement in the collective bargaining agreement. Hence, the arbitrator did not then have the authority to award retroactive promotions in this case. However, after the arbitrator's award was issued, we reversed our holding in 52 Comp. Gen. 920, *supra*, and held in our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), that employees detailed to higher grade positions for more than 120 days, without prior Civil Service Commission approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated, provided they are otherwise qualified for such promotions. We affirmed

this holding in *Reconsideration of Turner-Caldwell*, 56 Comp. Gen. 427 (1977). It was made retroactively effective, subject to the statute of limitations on claims, in *Marie Grant*, 55 Comp. Gen. 785 (1976).

Accordingly, we are of the opinion that the arbitrator's award may be sustained if modified to conform to the requirements of our *Turner-Caldwell* line of decisions, cited above. Those decisions were issued subsequent to the date of the award and, therefore, were not available to guide and assist the arbitrator in fashioning his remedy.

Annette Smith and the other grievants covered by this award may be given retroactive temporary promotions and backpay consistent with the holdings of our *Turner-Caldwell* decisions. For example, Annette Smith was detailed to a WG–2 position on October 10, 1972, and no extension of the detail was obtained from the Commission. Thus she became entitled to a temporary promotion to the higher grade position on the 121st day of the detail, which occurred on February 7, 1973. It should be noted that the presidential freeze on promotions, as distinguished from an agency-imposed freeze, would serve to bar any promotions for the duration of such freeze pursuant to section 12(a) of Executive Order 11491, as amended. However, the presidential freeze only covered the period from December 11, 1972, until January 29, 1973, which was well within the initial 120-day period of Annette Smith's detail and thus would not cause her retroactive temporary promotion incident to this award to be delayed.

[B–188665]

Bids—Late—Agency Responsibility

Bid received after specified deadline should be considered for award where agency failed to establish and implement procedures for timely receipt of bids.

Bids—Late—Mishandling Determination—Failure to Establish and Implement Procedures for Timely Receipt of Late Bids

Where agency practice is not to accept special delivery mail on weekends and passive reliance is placed on routine deliveries to insure timely arrival of bids for Monday afternoon bid opening even though delays might be expected due to weekend mail buildup, agency has failed to meet standard required for effective establishment and implementation of procedures for timely receipt of bids.

Bids—Timely Receipt—Evidence to Establish—Time/Date Stamp, etc.

Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation.

In the matter of the Federal Contracting Corporation, June 22, 1977:

The Federal Contracting Corporation (Federal) protests a determination that its bid was submitted too late for consideration for award under invitation for bids (IFB) DADA03-77-B-0488 issued by the Fitzsimmons Army Medical Center (FAMC) on February 18, 1977.

The IFB specified that bids would be received until 2 p.m., m.s.t., Monday, March 21, 1977, in the office of the Purchasing and Contracting Division (P&C), FAMC. Notations on the envelope for Federal's bid, sent by special delivery and certified mail on March 17, 1977, indicate that it was received by the Army post office, FAMC, at 2:40 p.m. on March 21 and was delivered to the P&C office at 2:50 p.m. The contracting officer determined that it was a late bid and could not be considered for award.

The IFB incorporated the provisions of paragraph 7-2002.2 of the Armed Services Procurement Regulation (1976 ed.) entitled "Late Bids, Modification of Bids or Withdrawal of Bids." Under this provision, a late bid may not be considered unless it is received prior to award and either was mailed "* * * not later than the fifth day prior to the date specified for receipt of bids" or "* * * it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation." Late receipt of a bid ordinarily will result in its rejection unless the specific conditions set forth in the solicitation are met. *B. E. Wilson Contracting Corporation*, 55 Comp. Gen. 220 (1975), 75-2 CPD 145. Since it is uncontroverted that Federal's bid was not mailed in time to satisfy the first criterion above, under the terms of the solicitation its bid may be considered for award only if it is determined that the late receipt was due to mishandling by FAMC after receipt at the "Government installation." See *The Hoedads*, B-185919, July 8, 1976, 76-2 CPD 21.

In this regard, the record indicates that Federal's bid was received in the Aurora, Colorado, office of the United States Postal Service (USPS) on Saturday, March 19, 1977, at about 5 p.m., but was not delivered to FAMC on either Saturday or Sunday, although a delivery of "perishables" consigned to the Clinical Investigation Service, FAMC, was made at 7:15 p.m. on March 19. The Aurora, Colorado, postmaster advised that no delivery was attempted because the FAMC duty officer on weekends "* * * would *not* accept any class or accountable 'specials' mail on Saturdays or Sundays except perishables." As a result of the inability of the Aurora USPS office to deliver Federal's bid directly to FAMC over the weekend, it was delivered to the USPS branch office at FAMC on Monday morning at 10 a.m., where it was held for delivery to the Army postal messenger. In this connection, we

note that pickups of accountable mail from the USPS branch office by FAMC mail personnel normally were scheduled in the morning between 8–9 a.m. and in the afternoon between 1–2 p.m. We are advised that exceptions to this schedule occurred in instances of delays due to heavy mail volume or in the event of telephone notification by USPS personnel that they had an item of mail requiring immediate attention.

Federal's bid was not picked up by Army postal personnel until 2:30 p.m. on Monday and was delivered to the FAMC Army mail facility at 2:40 p.m., where the time and date of receipt were hand-recorded on the bid envelope. The bid was delivered to the contracting officer at P&C at 2:50 p.m., an elapsed time of 20 minutes from receipt by FAMC mail personnel.

Federal contends that its bid was actually received by FAMC mail personnel at 10 a.m. on March 21 on the basis of a date/time stamp appearing on its return receipt for the bid in question. This stamp conflicts with the date and time hand-recorded on Federal's bid envelope. In explanation of the inconsistency, the FAMC mail officer advises that the date/time stamp is a manually adjusted device on which only the date is normally changed and that all mail was stamped as received at 10 a.m.

The IFB provision relating to late bids, noted above, provides in pertinent part that:

> (c) The only acceptable evidence to establish:
>
> * * * * * * *
>
> (ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained at the installation.

Under this provision, Federal's bid receipted on the envelope at 2:40 p.m. was not timely received. *B. E. Wilson Contracting Corporation*, *supra*. We conclude therefore that the delay in delivery of Federal's bid was not due to mishandling after receipt at the Government installation.

Federal, in a letter dated April 13, 1977, also contends that FAMC prevented timely delivery of its bid by refusing to accept special delivery mail on the weekends. We have long recognized the obligation of the Government to establish and implement procedures to insure that the transmission of bids from one place to another will not be unreasonably delayed and have distinguished between delays resulting from mishandling after receipt at the Government installation from those attributable to mishandling during the process of receipt. 42 Comp. Gen. 508 (1963); *Record Electric, Inc.*, 56 Comp. Gen. 4 (1976), 76–2 CPD 315; *Hydro Fitting Mfg. Corp.*, 54 Comp. Gen. 999 (1975), 75–1

CPD 331. In *Record Electric, Inc., supra*, we stated our position that, in unusual cases like this, the mishandling in the process of receipt by the Government must be paramount in the failure of a bid to be received on time.

In B–157176, August 30, 1965, we held that a bid should be considered for award where the post office attempted delivery of an air-mail special delivery bid on Sunday, the day before bid opening, and instructions at the Government installation precluded guards from accepting mail so that the post office had to redeliver the bid the next day and failed to do so until after bid opening. This decision is controlling here.

We note particularly that P&C personnel placed passive reliance on the Postal Service to timely deliver bids for a Monday bid opening after a weekend when delivery of such mail was made impossible by FAMC and when the normal course of delivery might well be expected to be delayed due to mail buildup over the weekend. In these circumstances, we think that FAMC personnel were, at the least, obligated to make timely inquiry of the USPS regarding the possibility of additional bids. No such action was taken. We consider the agency's conduct in these circumstances to fall short of the standard required for the effective establishment and implementation of procedures for the receipt of bids and regard such failure as the paramount cause of delay.

We therefore sustain the protest. Federal's bid should be considered for award.

We note parenthetically that FAMC has changed its practice of nonacceptance of accountable mail on the weekends and we have been advised that the FAMC mail facility is now stamping the correct time on receipted mail which should eliminate the possibility of recurrence of matters of this nature.

[B–187683]

Pay—Retainer—Navy or Marine Corps Members—Entitlement—On or After January 1, 1971

Under 10 U.S.C. 1401a(f) (Supp. V, 1975) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as a result of disciplinary action.

Pay—Retired—Disability—Computation—Method — Application of Act of October 7, 1975 (Pub. L. 94–106)

Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U.S.C. 6330 (1970), adjusted to reflect any applicable changes authorized by 10 U.S.C. 1401a (1970), if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U.S.C. 1401a(f) (Supp. V, 1975).

Pay—Retired—Disability—Rate Computed on Nondisability Formula—Excluded From Gross Income For Tax Purposes

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement.

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 532, June 23, 1977:

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision on three questions concerning the computation of retired or retainer pay in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 532, enclosed with the letter. All three questions are asked in connection with computing retired or retainer pay under the provisions of 10 U.S.C. 1401a(f) (Supp. V, 1975).

The first question is:

What pay grade is to be used in the computation of retainer pay in the case of a member who (a) was reduced prior to October 31, 1974, from the grade of E–8 to the grade of E–7 because of unsatisfactory performance of duty, or as a result of disciplinary action, and (b) was transferred pursuant to 10 U.S.C. 6330 to the Fleet or the Fleet Marine Corps Reserve on October 31, 1974, with entitlement to retainer pay from November 1, 1974, computed on the E–7 pay scale?

In responding to this question we are presuming that the member was eligible for transfer to the Fleet Reserve prior to being reduced in grade from E–8 to E–7.

The discussion in the Committee Action suggests that a literal interpretation of 10 U.S.C. 1401a(f) would appear to permit such member to have his retainer pay computed on the basis of pay grade E–8, a grade he held while eligible for transfer to the Fleet Reserve. However, the Committee questions whether Congress intended to reward such a member by allowing him to compute his retainer pay based on the higher grade.

Subsection (f) was added as an amendment to 10 U.S.C. 1401a by section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94–106, October 7, 1975, 89 Stat. 538–539. That subsection reads as follows:

(f) Notwithstanding any other provision of law, the monthly retired or retainer pay of a member or a former member of an armed force who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date, adjusted to reflect any applicable increases in such pay under this section. In computing the amount of retired or retainer pay to which such a member would have been entitled on that earlier date, the computation shall, subject to subsection (e) of this section, be based on his grade, length of service, and the rate of basic pay applicable to him at that time. This subsection does not authorize any increase in the monthly retired or retainer pay to which a member was entitled for any period prior to the effective date of this subsection.

This provision was added as amendment No. 534 to S. 920, 94th Congress, during the floor debate when that bill was being considered by the full Senate. Its provisions were incorporated in H.R. 6674, 94th Congress, which became Public Law 94–106. There were no hearings and no committee reports on the proposal other than brief statements in the conference reports on H.R. 6674 which indicate that its adoption was to correct the so-called "retired pay inversion." The colloquy that took place in the Senate at the time of its adoption also indicates that this amendment had as its purpose the correction of the retired pay inversion problem created by the fact that, for several years prior to the enactment of this provision, upward adjustments of retired pay and retainer pay under 10 U.S.C. 1401a were occurring in greater amounts and at greater frequency than were increases in active military basic pay, the result being that many of those who remained on active duty after becoming eligible for retirement were losing considerable retirement pay. See 121 Cong. Rec. S9928–S9933 (daily ed. June 6, 1975). It appears that the provision was intended to provide an alternative method of calculating retired pay or retainer pay and not to change the basis upon which a member becomes entitled to such pay.

We have long followed the rule that in construing a statute, its words and phrases should be given their plain, ordinary and usual meaning unless a different purpose is clearly manifested in the statute or its legislative history. See 46 Comp. Gen. 392 (1966). Section 1401a(f) of title 10, United States Code, clearly states that the retired or retainer pay of a member who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retired or retainer pay to which he would be entitled if he had become entitled to retired or retainer pay at an earlier date. It also specifically provides that in computing the amount of retired or retainer pay to which he would have been entitled on that earlier date, the computation shall, among other things, be based on his "grade"

applicable to him at that time. No exception to this rule is expressed in the language of the statute and none can be found in the legislative history.

Therefore, concerning the first question, the monthly retainer pay of a former member of the Navy or Marine Corps who initially became entitled to that pay on or after January 1, 1971, may not be less than the monthly retainer pay to which he would be entitled if he had transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect any applicable increases in such pay under 10 U.S.C. 1401a. This is so even though he may actually be transferred to the Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as a result of disciplinary action than the pay grade he held when he became eligible for transfer to the Fleet Reserve or Fleet Marine Corps Reserve. Accordingly, the grade of E–8 may be used in computing the member's retainer pay in the situation described in the first question.

The second question asked is:

Is an enlisted member who has been placed on the disability retired list entitled to a recomputation of pay using the provisions of 10 U.S.C. 6330 if (a) he was qualified for transfer to the Fleet or Fleet Marine Corps Reserve on a date prior to the date of his disability retirement and (b) the amount of retainer pay which he would have been entitled to receive had he been so transferred is greater than his present retired pay entitlement?

An enlisted member of the Navy or Marine Corps who has completed 20 or more years of active service in the Armed Forces may be transferred, at his request, to the Fleet Reserve or Fleet Marine Corps Reserve and be paid retainer pay pursuant to 10 U.S.C. 6330 (1970). Such members are not retired or entitled to retired pay until they have completed 30 years of service either by combining years of active service and service while a member of the Fleet Reserve or Fleet Marine Corps Reserve, or a total of 30 years' active service, or is retired pursuant to the provisions of chapter 61 of title 10, United States Code, by reason of physical disability.

The discussion in the Committee Action points out that in 41 Comp. Gen. 337, 339 (1961), we held that "retainer pay" granted under 10 U.S.C. 6330 may not be considered as "retired pay" as that term is used in 10 U.S.C. 1401. Therefore, it was held that a member could not receive retainer pay so long as he remains on the temporary disability retired list by virtue of the provision in 10 U.S.C. 1401 which gives members entitled to disability retired pay the benefit of the most favorable method of computation of "retired pay."

The Committee Action discussion indicates that while the language of 10 U.S.C. 1401a(f) is not clear in this regard, if the reasoning applied in 41 Comp. Gen. 337 were applied to section 1401a(f) to

prevent a member on a permanent retired list by reason of disability from computing his retired pay based on retainer pay entitlement, the purpose of section 1401a(f) as to such member would be defeated.

In the passage of 10 U.S.C. 1401a(f) it is considered that Congress did not intend to make a distinction between retired pay and retainer pay since to do so would defeat the intended purpose of permitting a recalculation to prevent a member from suffering a reduction in retired or retainer pay by remaining on active duty after becoming eligible for retired or retainer pay. This view is supported by the language of section 1401a(f) which consistently uses the terms "retired or retainer pay." That is not the case in section 1401 to which 41 Comp. Gen. 337 applies. Therefore, it is our view that for the purposes of 10 U.S.C. 1401a(f) the terms "retired pay" and "retainer pay" are interchangeable. To hold otherwise would also mean that a member of the Army or Air Force or an officer of the Navy or Marine Corps under circumstances described in the submission who may be eligible for retired pay after 20 years' active service would receive greater benefits than an enlisted member of the Navy or Marine Corps. It is not considered that Congress intended such an interpretation of the law.

Therefore, in applying 10 U.S.C. 1401a(f) to an enlisted member of the Navy or Marine Corps who is eligible for retired pay by reason of disability, it is our view that he may compute his pay pursuant to the provisions of 10 U.S.C. 6330, if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement and he otherwise meets the requirements of section 1401a(f). Assuming that to be the situation in question two, that question is answered in the affirmative.

The third question asked is:

> What is the proper rate of basic pay, if any, to be used in determining the amount of retired or retainer pay which is considered to be a pension, annuity, or similar allowance for personal injury, or sickness resulting from active service in the armed forces and therefore not included in the member's gross income under the provisions of 26 U.S.C. 104(a)(4)?

The authority for the administration and enforcement of the Internal Revenue Code rests primarily with the Secretary of the Treasury; therefore, questions concerning the proper application of 26 U.S.C. 104(a)(4) (1970) such as set forth in the third question should be addressed to the Treasury Department, Internal Revenue Service. Compare 40 Comp. Gen. 387, 391 (1960). However, as we indicated above, it is our view that by the enactment of 10 U.S.C. 1401a(f) Congress did not intend to change the basis upon which a member becomes entitled to retired or retainer pay; it merely provided an alternative method of computation of such pay. Thus, it is our view that a member

retired for disability, for example under 10 U.S.C. 1201 whose retired pay ordinarily would be computed under 10 U.S.C. 1401, but who is entitled to compute his pay on some other formula pursuant to 10 U.S.C. 1401a(f), still receives such retired pay by virtue of his disability retirement under section 1201.

[B-187375]

Contracts—Negotiation—Requests for Proposals—Protests Under—Allegation of Misrepresentation in Awardee's Proposal—Not Substantiated

Protester concludes, based on telephone conversations before and after award between successful offeror and itself, in which the possibility of protester working with successful offeror on project was discussed, that successful offeror was not completely staffed and should have been found unacceptable. Examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in evaluation of proposal since during negotiations successful offeror properly filled staff requirements from other firms.

Contracts—Negotiation—Lowest Offer—Price and Other Factors Considered

Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit.

Conflict of Interest Statutes—Contracts—Validity—Allegations of Violations Not Supported By Record

Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper.

In the matter of the QUAD Corporation, June 24, 1977:

QUAD Corporation protests the award of a contract to A. T. Kearney, Inc. (Kearney), under request for proposals (RFP) No. 11-FNS-76, issued by the Food and Nutrition Service (FNS), Department of Agriculture, to provide an in-depth economic and management study of alternate school food procurement systems in connection with the National School Lunch and School Breakfast Programs and to develop a model setting management guidelines for improving individual school's food procurement system. QUAD essentially contends that its offer was improperly evaluated vis-a-vis

Kearney's and that Kearney proposed to employ the services of food procurement personnel who have a conflict of interest because they are employees of institutional food suppliers and food management services.

Alleged Improper Evaluation

The basis for QUAD's contention of improper proposal evaluation rests on two telephone conversations between the president of QUAD and representatives of Kearney. The first telephone call occurred during negotiations. Kearney contacted QUAD in an attempt to supplement its staff. QUAD advised that it was also under consideration for award and such an arrangement was impossible. After award QUAD participated in a second telephone conversation, during which Kearney again mentioned the possibility of QUAD working with Kearney on the project.

Based on the conversations QUAD concludes that Kearney could not have submitted with its proposal a full list of proposed staff members and their qualifications if even after award Kearney was still recruiting additional staff. And QUAD concludes that it was more qualified to perform the required work than Kearney, especially since its initially proposed price was lower than Kearney's.

Kearney explains that, as a result of technical negotiations, it was advised of the necessity to strengthen its proposed staffing through the addition of consultants with specialized skills. QUAD was contacted in an effort to obtain the specialized skills of its president in the area of fresh meats and perishables. A 10 man-day effort was contemplated. When it was learned that QUAD was also competing for the FNS contract, the conversation concerning that project was terminated. After award Kearney again discussed QUAD's possible involvement with the project as a consultant.

Documentation provided by FNS, including evaluators' comments on initial proposals, letters to offerors pointing out weaknesses in offers, initial and best and final offers, and evaluators' comments on best and final offers, shows that Kearney's initial offer was weak because its proposed staff was considered to have an inadequate food procurement and nutritional background. To strengthen its offer, Kearney added three consultants with the desired expertise. Subsequently, the FNS Board of Contract Awards (Board) considered Kearney's revised offer to be technically acceptable.

QUAD's initial proposal was determined to be within the competitive range but it contained two weaknesses. The principal reason for QUAD's failure to participate further in the negotiations was that,

in the evaluators' view, QUAD furnished little information concerning its proposed approaches for the food procurement model and guides. During the negotiations QUAD was advised of the deficiency and was requested to provide specific information on its proposed approach for the food procurement model and guides. QUAD then submitted additional information and additional discussions between FNS evaluators and QUAD were held. After that the evaluators presented their findings to the Board and the Board concluded that QUAD's proposal was still deficient in providing the requested information and should receive no further consideration.

QUAD disagrees with FNS and contends that it provided sufficient explanation of its proposed food procurement model and guides. QUAD requests that our Office review FNS's rationale for award of the contract to Kearney.

It is not the function of our Office to evaluate proposals of unsuccessful offerors to determine which could have been selected for award. That function is the responsibility of the contracting agency, since it must bear the burden of any difficulties resulting from a defective evaluation. Thus, procurement officials enjoy a reasonable degree of discretion in the evaluation of proposals. Their determinations are entitled to great weight and must not be disturbed unless shown to be arbitrary or in violation of procurement statutes or regulations. *Tracor, Inc.*, 56 Comp. Gen. 62 (1976), 76-2 CPD 386. After examining (1) QUAD's proposal and all revisions; (2) the RFP's statement of work and evaluation factors; (3) the evaluators' comments; and (4) the Board's decision, we cannot conclude the FNS's determination concerning QUAD's proposal was arbitrary or in violation of procurement statutes or regulations.

QUAD also objects to the evaluation of its proposal because it initially offered a price lower than Kearney's. The RFP's evaluation scheme, not protested by QUAD, provided that proposals would first be evaluated and rated on disclosed nonprice criteria and then price. The record shows that after nonprice negotiations Kearney submitted the only acceptable proposal and following price negotiations, the contract was awarded to Kearney at a price lower than QUAD's initial and only price. We find no basis here to object to the award to Kearney.

Alleged Conflict of Interest

Kearney proposed using personnel employed by institutional food suppliers and food management services. QUAD contends that each of those companies has a vested interest in seeing that school buyers do not become stronger and more knowledgeable but that they become

more dependent on institutional food suppliers and food management services. QUAD states that Kearney's selection of those advisors indicates at best a lack of understanding and, at worst, a cynical disregard of the objectives of the project. QUAD concludes that if FNS knew before award who the advisors were to be, then FNS either did not follow its intentions to obtain an objective study or did not appreciate the effect of having sellers establish buying guidelines.

The RFP required each offeror to provide a resumé for each professional to be assigned to the project. Each member of an offeror's firm and consultants were to be clearly identified and the tasks or functions of each and the man-days required were to be stated. The RFP further required that the organizational structure of the proposed project team, the personnel to be assigned to each element, and the function of each element were to be disclosed. Finally, the Government reserved the right to remove any employee from the project if required for any reason and to approve replacement employees.

Our examination of Kearney's offer, including all modifications, shows that Kearney complied with all relevant requirements of the RFP regarding disclosure of identity, employee, and function of proposed employees and consultants, including the three persons QUAD alleges have a conflict of interest. Moreover, during the negotiations Kearney was aware of the possible appearance of a conflict of interest and specifically brought it to the attention of FNS. Kearney stated as follows:

> As described verbally in our meeting this morning, we intend to utilize the services of the following individuals from the food service industry: [List of three names, titles, and affiliations]
>
> * * * * * * *
>
> The above named individuals will each be involved in this project to the extent of approximately 20 man-days. The nature of their involvement will be as active members of the study team. For example, we expect them to participate actively in the field study, analyzing the alternative procurement systems and building the procurement models. We will utilize their technical expertise in developing the School System Food Procurement Guide, which is one of the tangible outputs from this study. We believe it is worth noting that each one of these individuals is responsible for the development and effective use in their respective field organizations of food procurement guides so that the practicality of their inputs to this phase of our work can be assured. The nature of the involvement of our food procurement specialists is such that we believe there will be ample opportunity for Food and Nutrition Service personnel to be exposed to their thinking during the course of the study.
>
> In order to avoid the appearance of any possibility of conflict of interest, we have organized our approach so that both the structuring of the procurement models and the corollary School Food Procurement Guide will be developed based on the broad experience of multiple representatives from each phase of the food service industry and not just from the three food procurement specialists alone. In this regard it should be reiterated that [Kearney] is responsible for this project in its entirety and that steps will be taken to assure complete objectivity by assuring that the food procurement specialists' input are limited to their unique areas of expertise.

After consideration of Kearney's modified offer, including the consultants from the food service industry, the Board considered Kearney's proposal to be acceptable and price negotiations were then conducted resulting in the award.

Recently, our Office has considered allegations of conflict of interest in substantially similar situations. In *PRC Computer Center, Inc.*, 55 Comp. Gen. 60 (1975), 75–2 CPD 35, an unsuccessful offeror contended that because the awardee's chairman of the Board of Directors held interests in the oil and gas industry, his firm should have been disqualified since the awardee would be in possession of sensitive proprietary data necessary for regulating the petroleum industry. There the procuring agency was informed of that fact. In the absence of a statutory or regulatory prohibition or a condition in that RFP excluding offerors with no connection to the oil and gas industry, we found no basis to exclude the awardee from participation.

In *Planning Research Corporation Public Management Services, Inc.*, 55 Comp. Gen. 911 (1976), 76–1 CPD 202, relying on the *PRC Computer Center, Inc.* decision, we stated that it is the primary responsibility of the procurement agency to balance the general policy of the Federal Government to allow all interested qualified firms an opportunity to participate in its procurements in order to maximize competition against the legitimate interest of preventing bias in study contracts.

In *VAST, Inc.*, B–182844, January 31, 1975, 75–1 CPD 71, an unsuccessful offeror contended that the successful offeror should have been excluded from consideration for award because the successful offieror was to perform preproduction sample testing and engineering testing of underwater listening devices while simultaneously analyzing the results of its own tests to determine compliance with the test procedures the successful offeror assisted in writing under separate contracts. Although the procuring activity failed to refute that contention, we denied the protest because our review of the statements of work of both contracts revealed no specific instance where a conflict of interest would result and the protester provided nothing more than mere allegations in this regard.

In *Exotech Systems, Inc.*, 54 Comp. Gen. 421 (1974), 74–2 CPD 281, the protester argued that award of a contract for maintaining and improving a national special education information center to the National Association of State Directors of Special Education should be prohibited because the National Association would be evaluating the work of its own members. Although the procuring activity contended that the contract contemplated no evaluation responsibilities, our examination of the RFP revealed that evaluation of special education services offered by state agencies was required. Further, the procuring

agency's evaluators were acutely aware of the appearance of a conflict of interest and they questioned the National Association closely on that point. As a result, the National Association developed procedures to be followed in the event of an actual or potential conflict of interest. Moreover, the agency's legal counsel reviewed the matter and approved the National Association's proposed procedures. Since (1) the potential conflict of interest was recognized and considered before award, (2) no statutory or regulatory provisions prohibited the National Association's participation in the procurement, and (3) no condition of the RFP excluded the National Association, we were unable to conclude that award to the National Association would be illegal.

With these principles in mind, we have examined the record before us and we reach the following conclusions: (1) any potential conflict of interest arising from the association of the three consultants was clearly recognized and thoroughly considered by FNS before award; (2) no condition of the RFP prohibited the association of consultants from the food service industry; and (3) such association violated no statute or regulation. In reaching these conclusions we have noted the relatively minor role of each consultant (20 man-days) in comparison to the projected total effort (about 400 man-days), Kearney's safeguards to minimize the appearance of the possibility of any conflict of interest, and FNS's contractural right to remove any member of Kearney's project staff if required for any reason and approve all replacements.

Accordingly, QUAD's protest is denied.

[B-188533]

Compensation—Severance Pay—Computation—Second Separation—Severance Pay Computed on Basis of Permanent Position

Upon involuntary separation by reduction in force from permanent position, employee was appointed without break in service to full-time temporary position with another agency. Employee is entitled to have severance pay computed on basis of basic pay at time of separation from permanent position, but years of service and age should be determined as of termination of temporary position because full-time temporary appointment is employment with a definite time limitation within meaning of 5 U.S.C. 5595(a) (2) (ii).

In the matter of Donald E. Clark—computation of severance pay, June 24, 1977:

By a letter dated March 2, 1977, Ms. Gabriela P. Turner, an authorized certifying officer of the Bureau of Indian Affairs (BIA), Depart-

ment of the Interior, has requested a decision concerning the claim of Mr. Donald E. Clark, a former BIA employee, for additional severance pay.

The record indicates that on April 23, 1975, Mr. Clark was involuntarily separated from his position with the BIA due to a reduction in force. At the time of his separation, Mr. Clark occupied a career appointment without limitation as a Tourism Development Specialist. Mr. Clark was immediately appointed on April 24, 1975, to a temporary excepted full-time position as a program director for the American Revolution Bicentennial Administration (ARBA). Although the initial temporary appointment to ARBA was for a period not to exceed October 23, 1975, that appointment was ultimately extended until November 29, 1976, when the position was terminated.

After Mr. Clark's separation from the BIA, he was administratively determined to be entitled to severance pay in the amount of $10,244.88, and he was furnished a notification of personnel action dated May 13, 1975, to that effect. Payment, however, of any portion of that amount was immediately suspended for the duration of Mr. Clark's temporary position with ARBA. Upon the termination of the temporary appointment with ARBA, BIA was notified in order to begin disbursements of severance pay, and Mr. Clark was notified on December 2, 1976, that his severance pay fund had been adjusted upward to $13,733.28. This recomputation was based upon Mr. Clark's final salary at BIA, $25,451 per annum, but reflected his additional time in service and increased age upon termination from ARBA. The authority for the recomputation was found in subparagraph S7–5e(2) of Book 550, Federal Personnel Manual Supplement 990–2, which provides that although agencies are required to use as an employee's basic pay the pay he was receiving at the time of involuntary separation from the appointment without time limitation, the employee's years of service and age are computed as of the time of the involuntary separation from the time limited appointment.

On December 22, 1976, however, BIA issued a further notification of personnel action cancelling the above recomputation as erroneous and reinstating the May 12, 1975, computation. The finding of error was predicated on the authority in 5 C.F.R. 550.707(b), which provides that when, without a break in service of more than 3 days, an employee who is entitled to severance pay accepts one or more temporary part-time or temporary intermittent appointments, the agency shall suspend the payment of severance pay for the duration of the temporary appointments, and that the period of service covered by the temporary appointments is not creditable for purposes of computing the

severance pay. In addition, it was noted that the example in subparagraph S7-5e(2)(ii) of FPM Supplement 990-2 involved a term appointment, whereas Mr. Clark held a temporary excepted appointment. Thus, although the provisions of 5 C.F.R. 550-707(b) are limited to only temporary part time or temporary intermittent appointments, it was administratively concluded that temporary full-time appointments should also be included therein. The BIA, therefore, determined that while an employee on a term appointment could have his service in the limited appointment included in the computation of his severance pay, an employee serving any temporary appointment could not.

Mr. Clark has filed a claim for severance pay in addition to the $10,244.88 amount which the BIA contends is his maximum entitlement. Specifically, Mr. Clark contends that his period of service and age factors should be determined as of the termination of his temporary appointment with ARBA, rather than at the time of his involuntary separation from the BIA. In addition, he claims that the computation of his severance pay fund should be based on his final salary of GS-13, step 6 ($28,358), at ARBA, rather than his final salary of GS-13, step 6 ($25,451), at the BIA, thus giving him the benefit of two general pay increases. For the below-stated reasons, we hold that Mr. Clark's severance pay should be computed using his basic pay at the time of his involuntary separation from the BIA ($25,451), and his years of service and age at the time of the termination of his temporary position with ARBA.

The basic authority for payment of severance pay to involuntarily separated Federal employees is found at 5 U.S.C. 5595 (1970). Regulations implementing this authority appear at 5 C.F.R. Part 550, Subpart G. However, 5 U.S.C. 5595(a)(2)(ii) specifically excludes from the definition of covered employees:

> an employee serving under an appointment with a definite time limitation, except one so appointed for full-time employment without a break in service of more than 3 days following service under an appointment without time limitation.

The term "definite time limitation" has not been further defined in either the statute or the implementing regulations. 50 Comp. Gen. 726 (1971). We have, therefore, reviewed the applicable legislative history and note that at page 8 of S. Rept. No. 910, 89th Cong., 1st Sess., which accompanied H.R. 10281, which became Public Law 89-301, it is clearly indicated that the severance pay provisions are applicable to an employee serving under an appointment with a definite time limitation when the employee was appointed thereto "immediately after

career service." We have held that this statement continues coverage of the severance pay provisions to an employee who receives a full-time temporary appointment within 3 days from the termination of his permanent employment. B–162646, December 6, 1967. Thus, the fact that an appointment is temporary, as distinguished from permanent or indefinite, satisfies the requirement that the subsequent appointment have a definite time limitation. In this connection we note that a term appointment is but a form of temporary appointment. Thus, no valid distinction may be drawn between "term" or "temporary" appointments for severance pay purposes. Rather, the relevant criteria in ascertaining severance pay coverage under 5 U.S.C. 5595(a)(2)(ii) are whether the appointment is full-time, for a limited duration (temporary), and without a break in service of more than 3 days.

If an employee's coverage is continued under 5 U.S.C. 5595(a)(2), the time for determining the employee's entitlement to severance pay is at the termination of the temporary appointment. B–157753, February 8, 1968. However, if by reason of a break in service or an appointment other than full-time an employee loses his severance pay coverage, the employee's entitlement is determined at the time of involuntary separation from the permanent position. 47 Comp. Gen. 72 (1965).

With respect to the computation of the severance pay fund, 5 C.F.R. 550.704(b)(4)(ii) provides as follows:

> * * * If an employee retains entitlement to severance pay under section 5595(a)(2)(ii) of that title, "basic pay at the rate received immediately before separation" under section 5595(c) of that title is that basic rate received immediately before the termination of the appointment without time limitation.

Noting that the authorizing legislation provides for payment of severance pay under rules and regulations to be promulgated by the President or his designee, we have held this regulation to be a valid exercise of administrative discretion. B–157753, December 20, 1965. However, the regulations governing the total years of creditable civilian service and the age adjustment to be used in computing the severance pay fund do not limit those factors to the date of the involuntary separation from the permanent position. See 5 C.F.R. 550.704(b)(2) and (3). In the absence of valid regulations to the contrary, under the rule of 47 Comp. Gen. 72 (1965), the employee's years of service and age adjustment are to be determined as of the termination of the temporary appointment. Accordingly, where after involuntary separation from an appointment without time limitation, an employee is appointed without a break in service of more than 3 days to a full-time temporary or other time limited position, the

employee's coverage under the severance pay provisions is determined upon the termination of the temporary position. Thus, if the employee is found eligible to receive severance pay, the amount of the severance pay fund is computed upon the employee's basic pay at the time of the separation from the appointment without time limitation, but his years of service and age adjustment are computed as of the time of the involuntary separation from the full-time temporary, or time limited, appointment.

In the present case, Mr. Clark was appointed to a full-time temporary (time-limited) position with ARBA without a break in service following his involuntary separation by reduction in force from the BIA. His employment, therefore, falls within the category of persons covered by 5 U.S.C. 5595(a)(2)(ii), thus rendering the provisions of 5 C.F.R. 550.707 inapplicable for the purpose of computing the severance pay fund. Therefore, under 5 C.F.R. 550.704(b)(4)(ii), Mr. Clark's severance pay should be computed using his basic pay at the time of his involuntary separation from the BIA ($25,451). However, under 5 C.F.R. 550.704(b) (2) and (3), his years of creditable civilian service and age adjustment are to be computed as of the time of the termination of his full-time temporary appointment with ARBA.

The voucher may be certified for payment in accordance with the foregoing.

[B-163084]

Funds—Revolving—Augmentation—Sale/Transfer of Surplus/Excess Property

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 483(c).

In the matter of the disposal of Veterans Administration revolving fund property, June 27, 1977:

This decision to the Administrator of the Veterans Administration (VA) is in response to a request from the Director, Supply Service, Department of Medicine and Surgery, VA, concerning VA's authority to sell silver recovered from VA supplies for which it currently has no need. Specifically, we have been asked whether VA has authority

under 38 U.S.C. § 5011 to sell such silver to the highest bidder, regardless of a declared need by another Government agency and, if so, whether it may sell the silver directly without going through the General Services Administration (GSA).

These questions arise out of a refusal by GSA to grant VA's request to sell 396,463 fine troy ounces of silver bullion on deposit at the U.S. Assay Office, New York, N.Y. GSA's position as expressed in its letter of March 7, 1977, to VA is as follows:

> * * * As far as we can determine, the only authority applicable to the disposition of your agency's silver by GSA is the Federal Property and Administrative Services Act of 1949, as amended (the Act).
>
> Section 202 of the Act [40 U.S.C. § 483] and the regulations issued thereunder require that excess property be made available for transfer to other Federal agencies prior to determining the property surplus. Section 203 of the Act [40 U.S.C. § 484] provides for sale of surplus property.
>
> In the past, there were no known Federal requirements for the silver recovered in your program, so the property was determined to be surplus and sold. However, the Department of Defense has recently registered a need for silver, and, therefore, we are unable to determine your agency's silver to be surplus to Federal needs until it has first been made available for transfer to other Federal agencies pursuant to Section 202. Should the silver be transferred to another Federal agency, we know of no authority that would require the transferee agency to render reimbursement in excess of your recovery expenses.

VA questions GSA's categorization of the silver as "excess." It contends that the silver is not excess but is a commodity for which it has a continuing need and, therefore, its needs are just as legitimate and demanding as the needs of the Department of Defense or any other Government agency. The implicit extension of this argument is that GSA should sell the silver for VA to the highest bidder regardless of the needs of another Government agency, and deposit the receipts of such sales to VA's revolving supply fund pursuant to 38 U.S.C. § 5011.

The Federal Property Management Regulations provide that whether personal property under the control of a Federal agency is "excess" to its needs is determined by the head of that agency. 41 C.F.R. § 101-43.001-5 (1976). GSA's assumption that the necessary determination was made that the silver is "excess" appears proper in view of VA's request that GSA sell the silver since we can find no rationale for VA's wish to sell a commodity it needs. We note that in a letter from the VA Administrator, transmitting the bill that became 38 U.S.C. § 5011, the VA itself characterized the silver recovered from exposed x-ray film as "not directly related to the mission of the Veterans' Administration." H. Rept. No. 878, 87th Cong., 1st Sess. (1961).

Once the determination that personal property is "excess" to the needs of an agency has been made and reported to GSA, the Administrator of GSA must determine whether the property is excess to the

needs of all Federal agencies, *i.e.*, "surplus." 41 C.F.R. § 101–43.001–20 (1976).

VA also contends that 38 U.S.C. § 5011 allows it to sell silver and deposit the receipts to the revolving supply fund without regard to the Federal Property and Administrative Services Act, *infra*, and GSA's property disposal requirements. In support of this position, it refers to the legislative history of Public Law 87–314 (September 26, 1961), 75 Stat. 675, which amended 38 U.S.C. § 5011.

The revolving supply fund was established by the Second Independent Offices Appropriation Act, 1954, 67 Stat. 193, and reenacted as section 1711 of the Veterans' Benefits Act of 1957, 71 Stat. 142, 38 U.S.C. § 5011. Section 5011 of title 38, U.S. Code, as amended, provides in pertinent part:

(a) The revolving supply fund established for the operation and maintenance of a supply system for the Veterans Administration (including procurement of supplies, equipment and personal services *and the repair and reclamation of used, spent, or excess personal property*) shall be—

* * * * * * *

(3) Credited with advances from appropriations for activities to which services or supplies are to be furnished, and all other receipts resulting from the operation of the fund, including *property returned to the supply system when no longer required by activities to which it had been furnished* [and] the proceeds of disposal of scrap, excess or surplus personal property * * *. [Italic supplied.]

The language underscored above was added to section 5011 by Public Law 87-314, *supra*, to clarify VA's authority to use its revolving supply fund for the repair and reclamation of personal property. The legislative history indicates that the legislation was designed to overcome our decision at 40 Comp. Gen. 356 (1960), in which we held that the law establishing the supply fund limited its use to financing supply and service activities directly related to the VA's mission, and that such activities did not include a proposed centralized program for the recovery of silver in salable form from x-ray developing solutions.

The amendment to section 5011 clearly permits VA to implement its silver recovery program through the revolving supply fund and to credit the fund with the proceeds from disposal of recovered silver. However, we find no indication in the legislative history of either the Second Independent Offices Appropriation Act, 1954, *supra*, or Public Law 87-314, *supra*, that the Congress intended to remove VA's property from GSA's overall control of property disposal, including disposal of recovered materials.

The Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471 *et seq.*, vests in the Administrator of GSA broad authority over the disposition of excess and surplus Government property. VA has no specific authority to sell property itself

except by delegation from GSA. In the absence of such authority, the transfer or sale of the silver in question must be handled by GSA in accordance with the Property Act and the regulations issued thereunder.

The Property Act and implementing regulations generally do not require reimbursement for excess property transfers; nor do they ordinarily permit an agency to retain the proceeds from surplus property sales. See 40 U.S.C. §§ 483(a), 485(a); 41 C.F.R. §§ 101–43.315–3, 101–45.307 (1976). However, an exception is provided by 40 U.S.C. § 485(c) as follows:

> Where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax or other revenue or receipts, then the net proceeds of the disposition or transfer shall be credited to the reimbursable fund or appropriation or paid to the Federal agency which determined such property to be excess * * *.

This exception requires "fair value" reimbursement, as determined by GSA, when requested in the case of excess property transfers, 40 U.S.C. § 483(a), and also permits retention of the proceeds from sales of surplus property, 40 U.S.C. § 485(a).

In our view, property acquired by the VA revolving fund established by 38 U.S.C. § 5011 falls within the reimbursement exception in 40 U.S.C. § 485(c), quoted above. See in this regard, B–116731, November 4, 1953, where we held that these reimbursement provisions applied to property acquired under a similar revolving fund. Moreover, 38 U.S.C. § 5011 clearly contemplates that the VA revolving fund will be credited with the proceeds of excess or surplus property transactions. We note that the GSA regulations state that the current policy of the Executive branch is not to provide reimbursement for transfers of working capital fund property. However, as indicated above, we believe that an exception to this policy is required in the case of transfers of property acquired by the VA revolving fund.

In sum, it is our opinion that, while the disposition of VA revolving fund property is subject to GSA control under the Property Act, reimbursement to the fund is required in the case of transfer or sale of such property if requested pursuant to 40 U.S.C. § 485(c).

[B–188455]

Transportation—Rates—Expedited Service—Shipment of Household Effects—Liability

Employee is not liable for expedited service charges on shipment of household goods moved under actual expense method where bill of lading contract between Government and carrier did not conform to rules in governing tariff.

Transportation—Rates—Tariffs—Waiver

Rules in a regulated common carrier tariff on file with regulatory commission are part of the tariff and cannot be waived.

In the matter of the Internal Revenue Service, June 28, 1977:

An authorized certifying officer of the Internal Revenue Service, Department of the Treasury, requests an advance decision whether Louis R. Geiser, an employee of the Service, is responsible for an expense of $84.65 allegedly incurred by the Government for expedited service furnished by Tom Munday, Inc., a common carrier by motor vehicle, to a shipment of Mr. Geiser's household goods transported incident to a change of permanent station. An original travel voucher was sent with the request.

Mr. Geiser's orders authorized a transfer from Oklahoma City, Oklahoma, to Lawton, Oklahoma. When intrastate transfers are authorized and because intrastate transportation rates often are higher than interstate rates, the Federal Travel Regulations authorize the use of the actual expense method of transporting household goods if it is administratively determined that the employee would experience unusual hardship through use of the commuted rate system. FPMR 101-7, 2-8.3-(4)(d). Under the actual expense method the Government ships the employee's property on a Government bill of lading and pays the transportation charges to the carrier. FPMR 101-7, 2-8.(3)b.(1). IRS states that the employee remains liable for any special services, like charges for expedited service, assessed by carriers and not normally included in a household goods moving service.

To assist in preparing the "Estimated Reimbursable Expenses" section of IRS Form 4253, "Authorization for Moving Expenses," Mr. Geiser obtained from Munday an estimated cost of the contemplated transportation service. As stated by Mr. Geiser:

> Mr. Grimmett [of Munday] came to my apartment * * * to view my household goods and prepare the estimate.
>
> In my discussion with Mr. Grimmet, I asked him what the timing would be on my move since I wanted to arrange for temporary quarters if necessary. He told me that since it was only a two-hour trip to Lawton and since my amount of household goods was relatively small, that my goods would be loaded, transported, and unloaded all in one day.
>
> When he completed the estimate, he handed me a copy. I noted an unusual entry ("2415/5000") for estimated weight and asked him what it meant. He said that, although he estimated the weight of my goods at 2415 pounds, the billing for the move would be at the rate for 5000 pounds. He said this was because the tariff was an *intra*state rate not subject to ICC Regulation and that there was a "minimum" of 5000 pounds. There was *no mention* of any additional charge for extraordinary services other than those noted on the form (stair carry and packing).
>
> * * * I made no statement to Mr. Grimmett or anybody else that could possibly have been construed as a request for expedited service. [Italic in original.]

This estimate apparently demonstrated the unusual hardship which would result from using the commuted rate system. However, under IRS regulations, the administrative determination to use the actual expense method must be justified by a GSA Form 2485, "Cost Comparison for Shipping Household Goods." IRM 1763, Section 545.24. The transportation expenses shown on GSA Form 2485 are normal transportation expenses based on an estimated weight of 2,415 pounds, and apparently supported the administrative determination to use the actual expense method.

The IRS' Facilities Management Branch prepared Government bill of lading No. K–0782603 authorizing Munday to transport Mr. Geiser's household goods to Lawton. Expedited service is not mentioned on the GBL.

The GBL and supporting documents show that Mr. Geiser's household goods actually weighed 1,960 pounds and were received at destination in apparent good order and condition. Munday later collected from IRS transportation charges of $384.05, based among other things on a rate of $4.61 per 100 pounds and a minimum weight of 5,000 pounds. This rate and minimum weight represent the charge for expedited service set forth in Item 150 of Midwest Motor Carriers Bureau Tariff 3–H, a tariff filed with the Corporation Commission of Oklahoma.

IRS, using information shown on the GSA Form 2485, determined that the cost of using expedited service was $84.65 in excess of what would have been the normal transportation charges and asked Mr. Geiser to refund that amount. He refused, claiming that he never authorized that service.

It is obvious that Mr. Geiser is a victim of circumstances and of incomplete and misleading advice from Munday's agent; Mr. Geiser never intended to use expedited service and it is not mentioned on the GBL, the contract between IRS and Munday, an indication that the Government never intended to use that service. Thus, we do not believe that Mr. Geiser is responsible for the $84.65 expense. Furthermore, we believe that the Government has been overcharged for the transportation services furnished to Mr. Geiser.

IRS asked Munday to refund $84.65 because the Government did not order the service. In response, Munday states:

> We have today re-checked the bill of lading on which Mr. Geiser moved, and find it to be correct in the computations under the *Oklahoma Intrastate Joint and Local Motor Freight Commodity Tariff 3–H* which we operate under. As you probably are already aware, we are under the Oklahoma Corporation Commission. This body grants us authority to operate as an Intra Carrier in the state of Oklahoma, subject to the provisions of said tariff.

We are required by the Tariff and the Oklahoma Corporation Commission to charge in full for any service which we perform. Any deviation from this Tariff places the carrier in violation. The deviation in this case, would be providing Expedited Service and charging at Carrier Convenience rates. The Tariff is the law under which we work. We believe that the Federal Government itself is an exponent of this law. [Italic in original.]

We agree with Munday that under Oklahoma law it is required to file tariffs with the Corporation Commission of Oklahoma and is forbidden to deviate from those tariffs. Title 47, Sections 163(A) and 163(E), Oklahoma Statutes, 1971. Item 150, titled "EXPEDITED SERVICE," is one of the rules and regulations in Tariff 3-H. It sets out in paragraph (a) the charge basis applicable to expedited service; paragraph (b) reads:

(b) The following form shall be completed on the bill of lading and freight bill:

EXPEDITED SERVICE ORDERED BY SHIPPER

SHIPMENT MOVING AT WEIGHT OF ________________ POUNDS.
ACTUAL WEIGHT ________________ POUNDS.
DATE AND HOUR OF LOADING ________________
DELIVER (OR TENDER) ON OR BEFORE ________________

This form is not reproduced on GBL No. K–0782603 nor on Munday's freight bill nor elsewhere in the record.

Section 163 of Title 46 of the Oklahoma Statutes, 1971, reads substantially the same as Sections 216 and 217 of the Interstate Commerce Act, as amended, 49 U.S.C. 316 and 317 (1970). Among other things, those sections prohibit a common carrier by motor vehicle from engaging in transportation unless its charges are published in tariffs filed with the respective Commissions, require carriers to publish and file tariffs with the Commissions and prohibit any deviations whatsoever from the rates, fares and charges specified in the tariffs.

Under the Interstate Commerce Act rigid adherence to the tariff is required for a carrier to recover under its provisions. *Davis* v. *Cornwell*, 264 U.S. 560 (1924); *Illinois Central R.R.* v. *Ready-Mix Concrete, Inc.*, 323 F. Supp. 609, 611 (E.D. La. 1971); *Baker* v. *Prolerized Chicago Corporation*, 335 F. Supp. 183, 185 (E.D. Ill. 1971). And, under that Act, the rules in a tariff are part of the tariff and cannot be waived. *Davis* v. *Henderson*, 266 U.S. 92 (1924); *cf. Sommer Corporation* v. *Panama Canal Company*, 475 F. 2d 292, 298 (5th Cir. 1973).

In *Gus Blass Co.* v. *Powell Bros. Truck Lines*, 53 M.C.C. 603 (1951), the Interstate Commerce Commission held that the omission of a required bill of lading endorsement was a defect fatal to the application of transportation charges based on an exclusive use of vehicle rule—a type of special service—even though the special service

actually was requested and furnished. Among other things, the Commission stated:

> It appears that defendant's [Powell's] position is that its failure properly to endorse the bill of lading and freight bill does not render inapplicable the provisions of governing the charges to be assessed, and that the requirement for such sions of the rule governing the charges to be assessed, and that the requirement for such endorsement is simply a matter of form, the absence of which does not affect the remaining provisions of the rule. We think not. It is well settled that a rule contained in a tariff is a part of the tariff, and cannot be waived. See *Bienville Warehouses Corp., Inc.*, v. *Illinois Central R. Co.*, 208 I.C.C. 583 and *Natural Products Refining Co.* v. *Central R. Co. of N.J.*, 216 I.C.C. 105, both citing *Davis* v. *Henderson*, 266 U.S. 92. In the latter proceeding the Supreme Court said:
>
> "There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. *It could not be. The transportation service to be performed was that of common carrier under published tariff. The rule was a part of the tariff.*" [Italic in original.]

In our opinion the substantially similar language of Section 163 of Title 46 of the Oklahoma Statutes, 1971 [compare Section 163(E) with 49 U.S.C. 317(b)] requires the same result here. Thus, Munday's charges for expedited service are not applicable to the shipment transported under GBL No. K-0782603.

In these circumstances, Mr. Geiser is not responsible for paying the $84.65 and we are returning the original travel voucher to IRS for such action as it deems appropriate.

We have furnished the Transportation Audit Branch, Federal Supply Service, General Services Administration, a copy of this decision for its use in connection with the audit of Munday's paid transportation bill. 49 U.S.C. 66(a) (Supp. V, 1975).

[B-183012]

Housing and Urban Development Department—Federal Insurance Administrator—Acting—Appointment—Limitation

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345-3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator.

Housing and Urban Development Department—Federal Insurance Administrator—Deputy—Status and Authority

Although the Acting Insurance Administrator was appointed Deputy Administrator on May 23, 1977, which job requires the Deputy to act in place of the Administrator during his absence or inability to act, this duty may not be performed until a new Administrator has been confirmed since maximum statutory period of 30 days to fill such vacancy under the Vacancies Act has already been exhausted.

Housing and Urban Development Department—Federal Insurance Administrator—Validity of Decisions—Unauthorized Period of Service

Validity of decisions made by the Acting Federal Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future.

Officers and Employees—*De Facto*—Compensation—Reasonable Value of Services Performed

It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of the Secretary and the President and may be considered a *de facto* employee, entitled to reasonable value of his services which equates to same amount as his salary.

In the matter of the Acting Federal Insurance Administrator's status and authority, June 29, 1977:

On December 9, 1976, we issued decision 56 Comp. Gen. 137, to the Secretary, Housing and Urban Development (HUD), in which we concluded that the position of Federal Insurance Administrator, established under 42 U.S.C. § 3533a (1970), requires Presidential nomination and Senate confirmation under Article II, § 2, Cl. 2 of the Constitution. We also stated that in the described circumstances, we did not think it appropriate for this Office to take exception to the past payments of compensation to the incumbent Insurance Administrator who was appointed to that position by the Secretary of HUD prior to the date of our decision in the belief that confirmation was unnecessary. However, since the Congress was not then in session, we did not object to the payment of compensation to the incumbent for a reasonable period of time following the date of the decision in order to afford an opportunity for the President to present him to the Senate for confirmation to the position of Federal Insurance Administrator. This is a follow-up decision, which examines the status of the incumbent Insurance Administrator from the time of our previous decision to date.

On January 11, 1977, former President Ford submitted the nomination of the incumbent, Mr. J. Robert Hunter, to the Senate. President Carter withdrew Mr. Hunter's nomination on February 21, 1977. Mr. Hunter, however, continued to serve as Acting Insurance Administrator, with compensation at the Executive Level IV pay scale.

According to a report received from the Secretary, HUD, dated May 2, 1977, it was decided, after a departmental review of Mr. Hunter's status, and taking into consideration our decision as well as subsequent events, that there was no longer legal authority for Mr. Hunter to continue to serve as Acting Insurance Administrator. The report further stated that she had then "taken action" to remove Mr. Hunter from the position and that his name had been submitted to the Civil Service Commission for the position of Deputy Administrator.

We are informed that on May 4, 1977, the Civil Service Commission received a request for Mr. Hunter's certification to the position of Deputy Administrator, Federal Insurance Administration, General Schedule (GS) pay grade 17. We have been told by a Commission official that favorable action on the certification was completed on May 19, and communicated to HUD on May 23, 1977. During the interim between May 4 and May 23, Mr. Hunter continued to serve as Acting Administrator. In fact, we understand that Mr. Hunter has been serving as Acting Administrator at all times in question, signing decision letters, issuing regulations, and testifying before the Congress in that capacity.

Once Congress was in session and there was no Presidential nomination for it to consider, the position of Insurance Administrator could only be filled temporarily in accordance with the provisions of the so-called "Vacancies Act."

5 U.S.C. § 3346 (1970) provides as follows:

> When an officer of a bureau of an Executive department or military department, whose appointment is not vested in the head of the department, dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

5 U.S.C. § 3348 provides that a vacancy caused by death or resignation may be filled temporarily under section 3346 for not more than 30 days. Section 3349 provides that a temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3346 may not be made otherwise than as provided by that section, except to fill a vacancy occurring during a recess of the Senate.

All the cited sections are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168. The legislative history of the Act makes it clear that the provisions now codified as sections 3345 through 3349 of title 5 were intended to preclude unreasonable delays in submitting nomi-

nations for offices subject to Senate confirmation. In a debate recorded in the Congressional Globe of February 14, 1868, when the original Act was being considered, a Member of the sponsoring Committee, Mr. Trumbull, complained that under present law—

> * * * he [the President] is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the Committee to be an unreasonable lengh of time, and hence they have limited it by this bill to thirty days.

The period of time was changed by floor amendment to 10 days, but increased to 30 days by the Act of February 6, 1891, which is the time limt now found in section 3348, *supra*.

We note that the position of Insurance Administrator has been without a nominee for 4 months already. This appears to be precisely the sort of "unreasonable" delay the statute was enacted to prevent. In the absence of any other statutory authority to fill the position on a temporary basis outside the Vacancies Act, we conclude that the 30-day limit is applicable, and began to run on February 22, 1977, the day after the President withdrew Mr. Hunter's nomination. Thus, from March 24, 1977, to date, there was no legal authority for anyone to perform the duties of the Insurance Administrator except the Secretary herself, in whom, by statute, all the Administrator's functions are vested.

In informal discussions with HUD, prior to its decision to create the position of Deputy Administrator, it was argued that the Secretary has broad authority to delegate any or all of her functions to subordinate employees, (42 U.S.C. 3535(d)) and therefore it was permissible for her to delegate all the functions relating to the insurance programs of HUD to Mr. Hunter in some capacity other than as Acting Administrator. We concede that a literal reading of the statute would permit the Secretary to refuse to give even a properly appointed Administrator any of the duties that would normally seem appropriate to his office. However, in this case, she has already delegated the duties to an Administrator, and made them part of his job description. Once the period in which he may legally perform those duties has expired, any redelegation to another position—particularly if the other position is occupied by the same man who can no longer serve as Administrator—would seem a patent circumvention of the Vacancies Act.

We next consider Mr. Hunter's status as Deputy Administrator, which began, as previously noted, on May 23, 1977. A similar position

was certified by the Civil Service Commission on June 29, 1976, but was canceled on January 10, 1977. The duties and responsibilities which are the same both for the previously established position and the current position, include the following:

> The Deputy Administrator for Federal Insurance Administration assists the Administrator in the performance of all of his duties and responsibilities and in general, is authorized to act for him both concurrently and in his absence. He participates with the Administrator in directing and coordinating the Department's activities with respect to the many major programs and responsibilities assigned to the Administrator.

As indicated by the position description, the Deputy Administrator may act for the Administrator in the Administrator's absence. The foregoing appears to contemplate a situation in which there is a duly appointed Administrator who may be absent and unable to perform his duties for various reasons, including travel, sickness, etc. This is a duty commonly assigned to deputies or first assistants throughout the Government and is certainly not objectionable *per se*. However, since the time has long since expired when anyone—whatever his title—may serve as Acting Administrator, Mr. Hunter may not perform that part of his duties.

We are mindful of the practical difficulties of being forced to run a program with no one at the head to make decisions. Until the President submits a nomination to the Senate, however, such decisions can only be made legally by the Secretary.

We have received a number of inquiries from members of the insurance industry and others as to the legality and binding effect of regulations issued and other decisions made by Mr. Hunter as Acting Administrator during the period he was not authorized to hold that position.

In general, we have held that acts performed while a person is serving in a *de facto* status are as valid and effectual insofar as they concern the public and the rights of third persons as though he were an officer *de jure*. 42 Comp. Gen. 495 (1963) and citations therein.

A *de facto* officer or employee is one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Where there is an office or position to be filled, and one acting under color of authority fills the office or position and performs its duties, his actions are those of a *de facto* officer or employee. See decision B–188424, March 22, 1977, and decisions cited therein. With regard to defective or invalid appointments, the general rule is stated in 63 Am. Jr. 2d *Public Officers and Employees* § 504 (1972) as follows:

> The general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so * * *.

In the aforementioned case, however, the occupancy of the position was not itself precluded by statute; it was only the individual incumbent who had not been validly appointed to the position. Court cases on this question are also sparse, although we feel that ultimately the questions raised by the insurance industry spokesmen will have to be resolved in that forum. We tend to agree with the Attorney General who, in 1920, warned the Department of State, which had been without a Secretary of State for a number of days, that—

> * * * Subsequent to such temporary occupancy of said Office and prior to confirmation by the Senate of a successor nominated for the Office, it was safer for the officers of the Department of State not to take action in any case out of which legal rights might arise which would be subject to review by the courts. 32 Op. Atty. Gen. 139.

It is too late now to offer the same advice to HUD. We suggest that the Secretary consider ratification of those actions and decisions of Mr. Hunter with which she agrees, to avoid any further confusion as to their binding effect.

Finally, with respect to Mr. Hunter's personal situation, he was not, as previously discussed, legally occupying the position of Insurance Administrator or Acting Administrator from March 23, 1977, on, and was not, as we understand it, appointed to any other position in HUD until May 23, 1977, when he became Deputy Administrator. Therefore, he was not entitled to receive salary and related benefits from the Department. However, we cannot consider Mr. Hunter a usurper, devoid of any color of authority. At all times relevant he performed the duties of the office of Insurance Administrator with the knowledge and apparent acquiescence of the Secretary and the President. In our view, he meets the definition of a *de facto* officer or employee, discussed *supra*, and would be entitled to receive the reasonable value of his services, which we believe is compensation at the Executive Level IV pay scale. See 55 Comp. Gen. 109, *supra*. It is therefore not necessary for us to take action to recover the salary paid to Mr. Hunter in the past. Since May 23, 1977, he can only be compensated at the GS–17 level established for his new position as Deputy Administrator.

INDEX

OCTOBER, NOVEMBER, AND DECEMBER 1977

LIST OF CLAIMANTS, ETC.

	Page
ABS Duplicators, Inc	497
Agriculture, Dept. of	500, 606
Air Force, Dept. of	624
Army, Asst. Secretary of	588
Army, Dept. of	646
Bailey, Robert A	593
BBR Prestressed Tanks, Inc	576
Boston Pneumatics, Inc	690
Brown Boveri Corp	597
Bunker Ramo Corp	712
Burks, Jesse A	604
Cascade Reforestation, Inc	500
Checchi and Co	474
Cheyenne River Sioux Tribe	655
Clark, Donald E	750
Collins, John F	661
Commerce, Dept. of	661
Computer Network Corp	695
Dana, Michael	471
Defense, Asst. Secretary of	483, 741
Development Associates, Inc	581
Elec-Trol, Inc	730
Environmental Protection Agency	593
Federal Contracting Corp	738
Federal Labor Relations Council	732
Foulks, Donald R	624
Geiser, Louis R	758
Globe Air, Inc	671
Goodyear, David C	710
Honeywell Information Systems, Inc	506
Housing and Urban Development Dept., Secretary of	762
Informatics, Inc	663
Interior, Dept. of	506, 751
Internal Revenue Service	758
International Computaprint Corp	663
Justice, Dept. of	471
Kappa Systems, Inc	676
Kaufman DeDell Printing, Inc	497
Labor, Dept. of	481
Law Enforcement Assistance Administration, Asst. Administrator	471
Lay, George W	562
Marine Corps, United States	525
McKenna Surgical Supply, Inc	532
Modjeska, Gerald L	481
Moorehead, William C	606
Murphy, E. L., Trucking Co	529
Nationwide Building Maintenance, Inc	556
Naval Supply Systems Command	695
Navy, Asst. Secretary of	551
North Carolina, State of, Secy. of Human Resources	567
Oklahoma of Chromalloy American Corp	538
Pacific Architects & Engineers, Inc	494
Peters, Gene	460
Pure Air Filter International	609
QUAD Corp	745
Raymond Corp	514
Robinson, Charles D	525
Schreck Industries	514
Silver Spring Blueprinting Co	497
Smith, Annette, et al	732
Southeastern Services, Inc	668
Southern California Ocean Studies Consortium	725
SRG Partnership, PC	721
State, Dept. of	629
Teledyne Ryan Aeronautical	635
Thermal Control, Inc	609
Tidewater Protective Services, Inc	650
Treasury, Asst. Secretary of	615
Treasury, Dept. of	758
Tymshare, Inc	695
Union Carbide Corp	487
Veterans Administration, Administrator	754
Veterans Administration, Veterans Affairs Administrator	551
Wellington Apartment Hotel	572
Worldwide Services, Inc	668

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page
1954, Sept. 3, 68 Stat. 1191-1194	657
1954, Sept. 3, 68 Stat. 1193	655
1954, Sept. 3, 68 Stat. 1194	657
1958, Sept. 2, 72 Stat. 1762	659
1958, Sept. 2, 72 Stat. 1766	659
1958, Sept. 2, 72 Stat. 1773	659
1962, Sept. 25, 76 Stat. 598	660
1962, Oct. 3, 76 Stat. 698	660
1962, Oct. 3, 76 Stat. 704	660
1965, Oct. 29, 79 Stat. 1111	752

UNITED STATES CODE

See also, U.S. Statutes at Large

	Page
5 U.S. Code 552a	698
5 U.S. Code 3106	623
5 U.S. Code 3345—3349	763
5 U.S. Code 3346	763
5 U.S. Code 3348	763
5 U.S. Code 3349	763
5 U.S. Code 5102(c)(7)	628
5 U.S. Code 5343	626
5 U.S. Code 5343(c)	625
5 U.S. Code 5343(c)(4)	626
5 U.S. Code 5343(f)	625
5 U.S. Code 5535	736
5 U.S. Code 5545	553
5 U.S. Code 5545(c)(1)	551
5 U.S. Code 5595	752
5 U.S. Code 5595(a)(2)	753
5 U.S. Code 5595(a)(2)(ii)	752
5 U.S. Code 5596	735
5 U.S. Code 5701 note	661
5 U.S. Code 5702(a)	575
5 U.S. Code 5703	661
5 U.S. Code 5703(c)	661
5 U.S. Code 5724a	563
5 U.S. Code 5724a(a)(4)	566
5 U.S. Code 6304(d)(1)	471
5 U.S. Code 6304(d)(1)(A)	473
5 U.S. Code 6304(d)(1)(B)	472
5 U.S. Code 6304(d)(2)	472
5 U.S. Code 6311	472
5 U.S. Code 7153	662
10 U.S. Code Ch. 61	743
10 U.S. Code Ch. 137	654
10 U.S. Code 687	588
10 U.S. Code 687(d)	589
10 U.S. Code 1201	745
10 U.S. Code 1401	743
10 U.S. Code 1401a	742
10 U.S. Code 1401a(f)	741
10 U.S. Code 1450	484
10 U.S. Code 1450(c)	485
10 U.S. Code 1450(e)	483
10 U.S. Code 1452(a)	483
10 U.S. Code 1552	589
10 U.S. Code 2304(a)(2)	516
10 U.S. Code 2304(a)(10)	650
10 U.S. Code 2304(g)	717
10 U.S. Code 2307	570
10 U.S. Code 2667	655
10 U.S. Code 2774	589
10 U.S. Code 2774(a)	591
10 U.S. Code 6330	743
11 U.S. Code 96(a)	504
12 U.S. Code 2601 note	564
15 U.S. Code 1601 note	564
16 U.S. Code 476	463
16 U.S. Code 460d	655
18 U.S. Code 201	584
22 U.S. Code 2354	533
26 U.S. Code 104(a)(4)	744
26 U.S. Code 6103	616
26 U.S. Code 6103(b)(4)	617
26 U.S. Code 6103(i)	617
26 U.S. Code 6103(j)	617
26 U.S. Code 6103(l)	617
26 U.S. Code 6321	503
28 U.S. Code 515-519	623
28 U.S. Code 2414	595
29 U.S. Code 791	662
31 U.S. Code 52c note	529
31 U.S. Code 53	576
31 U.S. Code 54	576
31 U.S. Code 203	503
31 U.S. Code 529	567
31 U.S. Code 628	570, 719
31 U.S. Code 724a	595, 619
31 U.S. Code 1176	499, 537, 668, 671, 675, 709

UNITED STATES CODE—Continued

	Page
33 U.S. Code 701c	646
33 U.S. Code 1251	576
33 U.S. Code 1251	487
33 U.S. Code 1284	577
33 U.S. Code 1284(a)(6)	577
37 U.S. Code 206(a)	590
37 U.S. Code 405	526
37 U.S. Code 501(a)(1)(B)	590
37 U.S. Code 501(f)	590
38 U.S. Code Ch. 51	486
38 U.S. Code 211(a)	591
38 U.S. Code 3010(d)	486
38 U.S. Code 5011	765
40 U.S. Code 34	573
40 U.S. Code 327	501
40 U.S. Code 471	557, 756
40 U.S. Code 483(a)	757
40 U.S. Code 485(a)	767
40 U.S. Code 485(c)	757
41 U.S. Code 10a–d	597
41 U.S. Code 10(a)–(e)	533
41 U.S. Code 15	503
41 U.S. Code 252(c)(1)	557
41 U.S. Code 252(c)(10)	556
41 U.S. Code 253	672
41 U.S. Code 255	570
41 U.S. Code 255(b)	571
41 U.S. Code 255(c)	571
42 U.S. Code 289*l*–4	475
42 U.S. Code 659	594
42 U.S. Code 1301(a)(1)	535
42 U.S. Code 2751	567
42 U.S. Code 2753	567
42 U.S. Code 2754	567
42 U.S. Code 3533 a	762
42 U.S. Code 3535(d)	764
42 U.S. Code 5301	646
42 U.S. Code 5303(a)(9)	648
42 U.S. Code 5305(a)	648
42 U.S. Code 5305(a)(2)	649
49 U.S. Code 66(a)	761
49 U.S. Code 66(b)	529
49 U.S. Code 316	769
49 U.S. Code 317	769
49 U.S. Code 317(b)	761
49 U.S. Code 1517	631

CONSTITUTION OF THE UNITED STATES

	Page
Art. II, Sec. 2, Cl. 2	762

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
2 Comp. Gen. 821	618
6 Comp. Gen. 214	624
17 Comp. Gen. 554	491
30 Comp. Gen. 457	608
31 Comp. Gen. 246	618
31 Comp. Gen. 340	466
34 Comp. Gen. 7	592
34 Comp. Gen. 221	595, 618
35 Comp. Gen. 710	551
37 Comp. Gen. 318	503
37 Comp. Gen. 688	665
38 Comp. Gen. 531	527
38 Comp. Gen. 532	491
39 Comp. Gen. 570	491
40 Comp. Gen. 95	616
40 Comp. Gen. 356	756
40 Comp. Gen. 387	744
40 Comp. Gen. 502	592
40 Comp. Gen. 679	491
41 Comp. Gen. 70	600
41 Comp. Gen. 148	540
41 Comp. Gen. 306	560
41 Comp. Gen. 337	743
42 Comp. Gen. 96	697
42 Comp. Gen. 203	531
42 Comp. Gen. 346	540
42 Comp. Gen. 383	491
42 Comp. Gen. 426	555
42 Comp. Gen. 495	765
42 Comp. Gen. 508	739
42 Comp. Gen. 617	590
43 Comp. Gen. 193	540
43 Comp. Gen. 209	491
43 Comp. Gen. 217	464
43 Comp. Gen. 235	530
43 Comp. Gen. 525	528
44 Comp. Gen. 312	618
44 Comp. Gen. 463	623
45 Comp. Gen. 312	610
45 Comp. Gen. 365	667
46 Comp. Gen. 98	623
46 Comp. Gen. 379	574
46 Comp. Gen. 392	742
46 Comp. Gen. 784	539
47 Comp. Gen. 21	559
47 Comp. Gen. 72	753
47 Comp. Gen. 84	482
47 Comp. Gen. 336	479
47 Comp. Gen. 778	492
48 Comp. Gen. 314	679
48 Comp. Gen. 384	600
48 Comp. Gen. 469	594
48 Comp. Gen. 536	512, 686
48 Comp. Gen. 605	492
49 Comp. Gen. 9	731
49 Comp. Gen. 28	540
49 Comp. Gen. 124	549
49 Comp. Gen. 305	574
49 Comp. Gen. 347	499
49 Comp. Gen. 530	470
49 Comp. Gen. 548	526
49 Comp. Gen. 656	591
49 Comp. Gen. 761	470
50 Comp. Gen. 66	626

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL—Continued

	Page
50 Comp. Gen. 137	610
50 Comp. Gen. 193	534
50 Comp. Gen. 222	512, 686
50 Comp. Gen. 246	686
50 Comp. Gen. 332	625
50 Comp. Gen. 565	477
50 Comp. Gen. 610	574
50 Comp. Gen. 697	536
50 Comp. Gen. 726	752
51 Comp. Gen. 195	600
51 Comp. Gen. 377	496
51 Comp. Gen. 397	477
51 Comp. Gen. 423	510
51 Comp. Gen. 431	479
51 Comp. Gen. 476	703
51 Comp. Gen. 479	697
51 Comp. Gen. 481	685
52 Comp. Gen. 312	540
52 Comp. Gen. 466	479
52 Comp. Gen. 558	648
52 Comp. Gen. 686	716
52 Comp. Gen. 748	626
52 Comp. Gen. 773	540
52 Comp. Gen. 870	644
52 Comp. Gen. 874	490
52 Comp. Gen. 920	736
53 Comp. Gen. 51	496
53 Comp. Gen. 161	540
53 Comp. Gen. 253	512
53 Comp. Gen. 270	654
53 Comp. Gen. 299	591
53 Comp. Gen. 301	623
53 Comp. Gen. 382	479
53 Comp. Gen 586	491
53 Comp. Gen. 593	685
53 Comp. Gen. 730	489
53 Comp. Gen. 780	512
53 Comp. Gen. 782	617
53 Comp. Gen. 800	477
53 Comp. Gen. 860	685
53 Comp. Gen. 977	645
54 Comp. Gen. 6	490
54 Comp. Gen. 66	693
54 Comp. Gen. 169	602, 644
54 Comp. Gen. 312	735
54 Comp. Gen. 403	735
54 Comp. Gen. 408	479
54 Comp. Gen. 421	749
54 Comp. Gen. 435	735
54 Comp. Gen. 468	582
54 Comp. Gen. 527	467
54 Comp. Gen. 538	735
54 Comp. Gen. 562	479, 696
54 Comp. Gen. 593	535
54 Comp. Gen. 612	478
54 Comp. Gen. 662	551
54 Comp. Gen. 760	736
54 Comp. Gen. 767	598
54 Comp. Gen. 791	490
54 Comp. Gen. 890	566
54 Comp. Gen. 896	723, 727
54 Comp. Gen. 967	491
54 Comp. Gen. 999	739
54 Comp. Gen. 1009	696
54 Comp. Gen. 1035	476
54 Comp. Gen. 1042	566
54 Comp. Gen. 1055	574
54 Comp. Gen. 1100	709
55 Comp. Gen. 1	550
55 Comp. Gen. 60	464, 510, 703, 749
55 Comp. Gen. 109	766
55 Comp. Gen. 113	592
55 Comp. Gen. 139	490
55 Comp. Gen. 220	738
55 Comp. Gen. 231	670
55 Comp. Gen. 244	717
55 Comp. Gen. 262	490
55 Comp. Gen. 374	654, 702
55 Comp. Gen. 390	490
55 Comp. Gen. 408	623
55 Comp. Gen. 413	489
55 Comp. Gen. 499	723
55 Comp. Gen. 510	633
55 Comp. Gen. 517	594
55 Comp. Gen. 539	732
55 Comp. Gen. 617	731
55 Comp. Gen. 629	735
55 Comp. Gen. 656	691
55 Comp. Gen. 693	556, 651
55 Comp. Gen. 785	737
55 Comp. Gen. 839	587
55 Comp. Gen. 864	512
55 Comp. Gen. 911	749
55 Comp. Gen. 958	531
55 Comp. Gen. 972	695
55 Comp. Gen. 1040	540
55 Comp. Gen. 1066	512
55 Comp. Gen. 1107	604
55 Comp. Gen. 1111	476, 645, 717
55 Comp. Gen. 1151	679, 697
55 Comp. Gen. 1230	630
55 Comp. Gen. 1295	496
55 Comp. Gen. 1362	549, 600
55 Comp. Gen. 1432	485
55 Comp. Gen. 1467	683
56 Comp. Gen. 4	739
56 Comp. Gen. 62	724, 747
56 Comp. Gen. 115	650
56 Comp. Gen. 137	762
56 Comp. Gen. 142	506, 697
56 Comp. Gen. 172	584
56 Comp. Gen. 216	633
56 Comp. Gen. 219	629
56 Comp. Gen. 245	695
56 Comp. Gen. 291	478
56 Comp. Gen. 381	731
56 Comp. Gen. 402	663, 674
56 Comp. Gen. 427	732
56 Comp. Gen. 896	727

DECISIONS OF THE COMPTROLLER OF THE TREASURY

	Page
26 Comp. Dec. 43	719

DECISIONS OVERRULED OR MODIFIED

	Page
35 Comp. Gen. 710	553
40 Comp. Gen. 95	615
48 Comp. Gen. 469	562
49 Comp. Gen. 305, action withdrawn	572
53 Comp. Gen. 782	615
54 Comp. Gen. 662	553
54 Comp. Gen. 1055	572
55 Comp. Gen. 1447	615
56 Comp. Gen. 115	649
56 Comp. Gen. 142	513
56 Comp. Gen. 219	629
56 Comp. Gen. 245	694
56 Comp. Gen. 402	663
B-161891, Aug. 21, 1967	655
B-163203, Mar. 24, 1969	615
B-165280, Dec. 31, 1969	572
B-142250, May 2, 1961	562
B-143673, Nov. 11, 1976	615
B-159633, Sept. 10. 1974	562
B-162645, Oct. 27, 1967	562
B-168211, Dec. 30, 1969	615
B-182219, Oct. 23, 1974	615

DECISIONS OF THE COURTS

	Page
Adelhardt Construction Co. *v.* United States, 123 Ct. Cl. 456	470
Airco Inc. *v.* Energy Research and Development Administration, 528 F. 2d 1294	687
Airco, Inc. *v.* United States, 504 F. 2d 1133; 205 Ct. Cl. 493	469
Baker *v.* Prolerized Chicago Corp., 335 F. Supp. 183	760
Beatty *v.* United States, 144 Ct. Cl. 203	466
Bielic *v.* United States, 197 Ct. Cl. 550	736
Blass, Gus, Co. *v.* Powell Bros. Truck Lines, 53 M.C.C. 603	760
Bolling *v.* Howland, 398 F. Supp. 1313	594
Camp Sales Corp. *v.* United States, 77 Ct. Cl. 659	466
Catalanello *v.* Cudahy Packing Co., 27 N.Y.S. 2d 637, aff'd 34 N.Y.S. 2d 37, appeal denied 35 N.Y.S. 2d 726	658
Cities Service Helex, Inc. *v.* United States, 543 F. 2d 1306	469
Corbetta Construction Co., Inc., ASBCA No. 6290, 1964 BCA 4386	466
Costin *v.* Hollywood Credit Clothing Co., 140 A. 2d 696	594
Cumberland Portland Cement Co. *v.* Reconstruction Finance Corp., 140 F. Supp. 739	504
Davis *v.* Cornwell, 264 U.S. 560	760
Davis *v.* Henderson, 266 U.S. 92	760
Darrow *v.* Hanover Township, 58 N.J. 410, 278 A. 2d 200	565
Diamond Door Co. *v.* Lane-Stanton Lumber Co., 505 F. 2d 1199	504
Emery Air Freight Corp. *v.* United States, 499 F. 2d 1255; 205 Ct. Cl. 49	531
Equitable Lumber Corp. *v.* I.P.A. Land Development Corp., 381 NYS 2d 459	468
Everett Plywood and Door Corp. *v.* United States, 419 F. 2d 425; 190 Ct. Cl. 80	467
Federal Crop. Ins. Corp. *v.* Merrill, 332 U.S. 380	595
Ferroline Corp. *v.* General Aniline & Film Corp., 207 F. 2d 912	541
Ganse *v.* United States, 180 Ct. Cl. 183	736
Goldfarb *v.* Virginia State Bar, 421 U.S. 773	565
Gottlieb *v.* Sandia American Corp., 452 F. 2d 510	502
Great Northern Ry. Co. *v.* United States, 178 Ct. Cl. 226	531
Grismac Corp. *v.* United States, 22 CCF para. 80252 (Ct. Cl. No. 4-72)	548
Hadden *v.* United States, 132 Ct. Cl. 529	502
Hartford Accident & Indemnity Co. *v.* United States, 130 Ct. Cl. 490	470
Hartsville Oil Mill *v.* United States, 271 U.S. 43	466
Hi-Ridge Lumber Co. *v.* United States, 443 F. 2d 452	464
Illinois Central R.R. *v.* Ready-Mix Concrete, Inc., 323 F. Supp. 609	760
Imperial Chemical Industries Limited *v.* National Distillers and Chemical Corp., 342 F. 2d 737	547
Jones *v.* Star Credit Corp., 298 NYS 2d 264	468
Keco Industries, Inc. *v.* United States, 492 F. 2d 1200; 203 Ct. Cl. 566	604
Kesl's Estate, In Re, 117 Mont. 377, 161 P. 2d 641	658
Kewanee Oil Co. *v.* Bicron Corp., 416 U.S. 470	541
Kiewit, Peter, Son's Co. *v.* Summit Construction Co., 422 F. 2d 242	469
Konigsberg *v.* Hunter, 308 F. Supp. 1361	624
Ling-Temco-Vought, Inc. *v.* United States, 475 F. 2d 630; 201 Ct. Cl. 135	469
Manloading & Management Associates, Inc. *v.* United States, 461 F. 2d 1299; 198 Ct. Cl. 628	706
Merrill-Stevens Dry Dock & Repair Co. *v.* United States, 119 Ct. Cl. 310	469
Missouri Pacific Railroad Co. *v.* Slayton, 407 F. 2d 1078	502
Munsey Trust Co., United States *v.*, 332 U.S. 234	591
National City Bank of Evansville *v.* United States, 143 Ct. Cl. 154, 163 F. Supp. 846	502
New York and Puerto Rico Steamship Co., United States *v.* 239 U.S. 88	470
Nickelson *v.* General Motors Corp., 391 F. 2d 196	547
Paccon, Inc., ASBCA No. 7890, 1963 BCA 3659	466
Palmore *v.* United States, 411 U.S. 388	595
Paul *v.* United States, 371 U.S. 245	470
Pearlman *v.* Reliance Insurance Co., 371 U.S. 132	502
Penn Central Co. *v.* General Mills, Inc., 439 F. 2d 1338	531
Pernell *v.* Southall Realty, 416 U.S. 363	595
Russell Electric Co., United States *v.*, 250 F. Supp. 2	470
Scarborough *v.* Berkshire Fine Spinning Associates, 128 F. Supp. 948	504
Schmidt *v.* United States, 192 Ct. Cl. 420	590

DECISIONS OF THE COURTS—Continued

	Page
Smith, A. O., Corp. *v.* Petroleum Iron Works Co. of Ohio. 73 F. 2d 531	547
Smith *v.* Dravo Corp., 203 F. 2d 369	541
Sommer Corp. *v.* Panama Canal Co., 475 F. 2d 292	
South Side Bank & Trust Co. *v.* United States, 221 F. 2d 813	503
Speers, Trustee in Bankruptcy, United States *v.*, 382 U.S. 266	504
Strickland Transp. Co., Inc., United States *v.*, 200 F. 2d 234	531
Union Carbide Corp. *v.* Russell Train, et al., Civ. Action No. 76-1973	489
Union Carbide Corp. *v.* Russell E. Train, et al., Civ. Action No. 76-5272	489
West. A. E., Petroleum Co. *v.* Atchison, T. & S.F. Ry. Co., 212 F. 2d 812	531
Western Grain Co. *v.* St. Louis-San Francisco Ry., 56 F. 2d 160	531
Wilhelm *v.* U.S. Dept. of the Air Force, 418 F. Supp. 162	594
Williams *v.* Walker-Thomas Furniture Co., 350 F. 2d 445	468

OPINIONS OF THE ATTORNEY GENERAL

	Page
32 Op. Atty. Gen.	766

INDEX DIGEST

APRIL, MAY, AND JUNE 1977

ABSENCES (*See* LEAVES OF ABSENCE)

ADVERTISING

Advertising *v.* negotiation

Formal advertising "wherever possible" — Page

Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible." ---- 556

Negotiation propriety

Waiver of formal advertising procedures

Since Administrator, General Services Administration, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision ---- 556

Specifications availability

Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified ---- 649

AGENTS

Government

Authority

Government liability

Department of Justice appropriations are available to pay legal expenses, including private attorneys' fees, incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason. 40 Comp. Gen. 95 and other similar decisions, overruled ---- 615

ALASKA
Employees
Failure to complete employment agreement
Refund of transportation and travel expenses
Not required Page

Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination 606

ALLOWANCES
Station. (*See* **STATION ALLOWANCES**)
ANNUAL LEAVE (*See* **LEAVES OF ABSENCE, Annual**)
APPOINTMENTS
Absence of formal appointment
Reimbursement for services performed

It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of the Secretary and the President and may be considered a *de facto* employee, entitled to reasonable value of his services which equates to same amount as his salary 761

Presidential
Federal Insurance Administrator

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345-3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator 761

Status
De facto

Validy of decisions made by the Acting Federal Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future 761

APPROPRIATIONS
Augmentation
Contract administration costs
Allegation not sustained by record

Allegation that agency's incurrence of additional contract administration costs because of contractor's deficiencies in one area would constitute an improper augmentation of appropriations cannot be sustained where record does not indicate that funds appropriated for procurement purposes will be supplemented by funds appropriated for other purposes 712

APPROPRIATIONS—Continued
Availability
Damages for unauthorized disclosure of tax return information Page
Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled 615
Judgments, decrees, etc. (*See* **COURTS, Judgments, decrees, etc., Payment**)
Judgments
Indefinite appropriation availability. (*See* **APPROPRIATIONS, Permanent indefinite, Judgments**)
Justice Department
Litigation expenses
Tax matters
Department of Justice appropriations are available to pay legal expenses, including private attorneys' fees, incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason. 40 Comp. Gen. 95 and other similar decisions, overruled 615
Permanent indefinite
Judgments
Against officers and employees
The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled 615
ARBITRATION
Award
Retroactive promotion with backpay
Violation of collective bargaining agreement
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award .. 732

ARCHITECT AND ENGINEERING CONTRACTS (*See* **CONTRACTS, Architect, engineering, etc., services**)

ARMED SERVICES PROCUREMENT REGULATION

First article and initial production testing Page

Armed Services Procurement Regulation 1-1903(a)(iii) controls both first article testing and initial production testing 65

ARMY DEPARTMENT

Corps of Engineers

Construction projects

Flood control

Matching grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

ASSIGNMENT OF CLAIMS (*See* **CLAIMS, Assignments**)

ATTORNEYS

Fees

Employee transfer expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Attorney fees**)

AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

AWARDS

Contract awards. (*See* **CONTRACTS, Awards**)

Arbitration. (*See* **ARBITRATION, Award**)

BANKRUPTCY

Contract assignment

Assignee *v.* trustee

Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer 499

Contractors

Payments due under Government contracts. (*See* **CONTRACTS, Payments, Bankrupt contractor**)

BIDDERS

Responsibility *v.* bid responsiveness

Descriptive literature requirement

Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid 608

BIDS

Aggregate *v.* separable items, prices, etc.

Solicitation requirement Page

Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487

Base bid and alternates. (*See* **BIDS, Aggregate *v.* separable items, prices, etc.**)

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Buy American Act

Buy American Certificate

No exceptions stated by bidder

Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, subpart B, section 201.11, which is virtually identical to "Buy American Act," 41 U.S.C. 10 (a)–(e), is incorrect. While true that American Medical Instrument Corporation (AMICO) substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offer will result in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award 531

Foreign product determination

Subcontractor's product *v.* end product

Item to be delivered under subcontract containing Buy American clause constitutes an end product for purpose of Buy American Act even though item is to be incorporated into ultimate end product by prime contractor 596

Competitive system

Adequacy of competition

Sustained by record

Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions .. 487

Equal bidding basis for all bidders

Bidders' superior advantages

If not the result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency .. 689

BIDS—Continued
Competitive system—Continued
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)
Specifications
Defective Page
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497
Conformability of articles to specifications. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations**)
Evaluation
Aggregate *v.* separable items, prices, etc.
Specification propriety. (*See* **CONTRACTS, Specifications, Aggregate *v.* separable items**)
Formula
Defective
Government's formula for evaluating bids which does not reflect anticipated requirements raises significant issue notwithstanding agency's view that protest is untimely 668
Method of evaluation
Lowest bid not lowest cost
Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668
Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671
Testing costs
General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable 689
Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)

BIDS—Continued
Late
Agency responsibility Page
Bid received after specified deadline should be considered for award where agency failed to establish and implement procedures for timely receipt of bids ---- 737
Mishandling determination
Failure to establish and implement procedures for timely receipt of late bids
Where agency practice is not to accept special delivery mail on weekends and passive reliance is placed on routine deliveries to insure timely arrival of bids for Monday afternoon bid opening even though delays might be expected due to weekend mail buildup, agency has failed to meet standard required for effective establishment and implementation of procedures for timely receipt of bids ---- 737
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Preparation
Costs
Noncompensable
Nonresponsive bid
Claim for "loss of profits" is not recoverable against Government. In addition claim for bid preparation costs is denied where bid was properly rejected as nonresponsive ---- 608
Protests. (*See* **CONTRACTS, Protests**)
Request for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)
Responsiveness
"Two bites at the apple" rule
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition ---- 487
Small business concerns
Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)
Specifications. (*See* **CONTRACTS, Specifications**)
Timely receipt
Evidence to establish
Time/date stamp, etc.
Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation ---- 737
BUREAU OF LABOR STATISTICS (*See* **LABOR DEPARTMENT, Bureau of Labor Statistics**)

BUY AMERICAN ACT
Applicability
Contractors' purchases from foreign sources
End product *v.* components Page
Item to be delivered under subcontract containing Buy American clause constitutes an end product for purpose of Buy American Act even though item is to be incorporated into ultimate end product by prime contractor 596
Waiver
Agency determination
Not reviewable by GAO
Agency refusal to waive Buy American Act evaluation for foreign items is not reviewable by GAO 596
CLAIMS
Assignments
Contracts
Assignee's rights no greater than assignor's
Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign 499
Conflicting claims
Assignee *v.* IRS
While IRS is entitled to setoff against assignee-bank any of its claims against assignor-contractor which matured prior to assignment, agency may not set off claims which matured subsequent to assignment 499
Federal tax lien, unrecorded as of time of bankruptcy, is invalid against trustee in bankruptcy which would have priority to funds withheld from amount owed bankrupt contractor under contract 499
Notice of assignment
Payment status
Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer 499
Set-off. (*See* **SET-OFF, Contract payments, Assignments**)
Contract payments. (*See* **SET-OFF, Contract payments, Assignments**)
Evidence to support
Administrative records contrary to allegations
Acceptance of administrative statements
Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost a month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take 459

CLAIMS—Continued
Priority
Wage claims, etc. *v.* assignees' Page
Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid an amount sufficient to cover underpayments was withheld, assignor has no rights to funds to assign 499
Wage claims, etc. *v.* taxes
Claims by workers underpaid under Contract Work Hours and Safety Standards Act and Service Contract Act would prevail over Internal Revenue Service (IRS) tax liens which matured subsequent to underpayments 499
Set-off. (*See* SET-OFF)
Waiver
Debt collections. (*See* DEBT COLLECTIONS, Waiver)
CLASSIFICATION
Actions
Effective date
Effective date of conversions of employees' positions from Wage Board to General Schedule may not be retroactively changed even though some employees were converted prior to effective date of Wage Grade pay adjustment, thus losing benefit of adjustment, while other employees were converted after pay adjustment and had General Schedule pay set on basis of higher wage. Federal Personnel Manual, Subchapter 7–1.a, sets effective date of classification actions as date action is approved or later date specified by agency and prohibits retroactive effective date 624
Debt. (*See* DEBT COLLECTIONS)
COLLEGES, SCHOOLS, ETC.
Grants-in-aid
Educational programs. (*See* STATES, Federal aid, grants, etc., Educational institutions)
COMPENSATION
Military pay. (*See* PAY)
Promotions
Temporary
Detailed employees
Retroactive application
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award 732

COMPENSATION—Continued
Rates
Conversion of positions from wage board to classified. (*See* **COMPENSATION, Wage board employees, Conversion to classified positions**)
Severance pay
Computation
Second separation Page
Severance pay computed on basic pay of permanent position
Upon involuntary separation by reduction in force from permanent position, employee was appointed without break in service to full-time temporary position with another agency. Employee is entitled to have severance pay computed on basis of basic pay at time of separation from permanent position, but years of service and age should be determined as of termination of temporary position because full-time temporary appointment is employment with a definite time limitation within meaning of 5 U.S.C. 5595(a)(2)(ii) 750
Wage board employees
Conversion to classified positions
Effective date
Retroactive prohibition
Effective date of conversions of employees' positions from Wage Board to General Schedule may not be retroactively changed even though some employees were converted prior to effective date of Wage Grade pay adjustment, thus losing benefit of adjustment, while other employees were converted after pay adjustment and had General Schedule pay set on basis of higher wage. Federal Personnel Manual, Subchapter 7-1.a, sets effective date of classification actions as date action is approved or later date specified by agency and prohibits retroactive effective date.... 624
Rate establishment
Environmental differential
Employees whose positions are converted from Wage Grade to General Schedule may have environmental differential considered as included in definition of "rate of basic pay" for the purpose of establishing their compensation in General Schedule under 5 C.F.R. Part 539. Civil Service Regulations state that environmental differential is part of employee's basic rate of pay and that it is used in computation of premium pay, retirement benefit and life insurance 624
Withholding
Debt liquidation
Alimony and child support
Environmental Protection Agency negligently failed to withhold specified amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592

CONFLICT OF INTEREST STATUTES
Contracts
Enforcement of standards of conduct
Agency responsibility
Page
Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement---- 580
Validity
Allegations of violations not supported by record
Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper---- 745
CONSUMER PRICE INDEX (*See* LABOR DEPARTMENT, Bureau of Labor Statistics, Consumer price index)
CONTRACTORS
Allegations
Not substantiated by record
Timber sales contracts. (*See* TIMBER SALES, Contracts, Contractors, Allegations, Not substantiated by record)
Conflicts of interest
Resume
Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper---- 745
Incumbent
Competitive advantage
If not the result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency---- 689
Responsibility
Contracting officer's affirmative determination accepted
Exceptions
Fraud
Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility criteria are not being applied---- 689

CONTRACTS

Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)

Architect, engineering, etc., services

Award board *v.* technical board selection

Timing of report documenting reversal Page

Noncontemporaneous timing of report documenting reversal of priority of negotiation selections of technical board by awards board delegated authority of agency head to make final selection for negotiation of architect-engineer contract does not affect substance of justification where proper basis for negotiation priority existed. In any event, noncontemporaneous report essentially elaborated on reasons for priority already in contemporaneous report 721

Evaluation boards

Private practitioners

Federal Procurement Regulations requirement

Federal Procurement Regulations para. 1–4.1004–1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721

Procurment practices

Forest Service

Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits 721

Assignments. (*See* **CLAIMS, Assignments, Contracts**)

Automatic Data Processing Systems. (*See* **EQUIPMENT, Automatic Data Processing Systems**)

Awards

Advantage to Government

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Awards, Advantageous to Government**)

Cancellation

Erroneous awards

Bid evaluation base

Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668

Initial proposal basis

Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580

CONTRACTS—Continued
Awards—Continued
Negotiated contracts. (*See* CONTRACTS, Negotiation, Awards)
Separable or aggregate
Single award
Page
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487
Small business concerns
Set-asides
Negotiation authority
Since Administrator, General Services Administration, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision 556
Restrictive of competition
Series of General Accounting Office decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders—small business concerns—since restriction of competition under current law is not compatible with formal advertising 556
Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible." 556
Bids
Generally. (*See* BIDS)
Brand name or equal. (*See* CONTRACTS, Specifications, Restrictive, Particular make)
Buy American Act
Buy American Certificate. (*See* BIDS, Buy American Act, Buy American Certificate)
Foreign products
Failure to indicate
Price adjustment
Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct, but General Services Administration has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation 531

CONTRACTS--Continued
Clauses
Late bids, etc. Page
Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation..... 737
Competitive system
Federal aid, grants, etc.
Compliance
Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases..... 575
Conflicts of interest prohibitions
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Conflicts of interest prohibitions**)
Data, rights, etc.
Disclosure
Trade secrets
Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps..... 537
Status of information furnished
Government participation in development costs, etc.
Acceptance of protester's unsolicited proposal is not dispositive that TF-30 blade shroud repair process set out in proposal was proprietary data and that Government violated protester's rights by disclosing process in subsequently issued RFP, where acceptance was caused by administrative error and proposal's restrictive legend recognizes that nonproprietary common shop practices or process independently developed by Government or another firm are not protected against disclosure by Government..... 537
Unsolicited proposals
Although it is disputed whether protester's informal disclosure of alleged trade secret (repair process on TF-30 engine) to Air Force prior to submission of unsolicited proposal containing proper restrictive legend was in confidence, legitimate proprietary rights of protester on alleged trade secret contained in proposal have not been defeated by prior Air Force-protester discussions of sceret under repair contract or Air Force's limited disclosure of secret to TF-30 engine manufacturer for evaluation and testing purposes, since secret was not generally disclosed by Air Force prior to unsolicited proposal's submission..... 537

CONTRACTS—Continued
Data, rights, etc,—Continued
Trade secrets
Protection
Page
Although trade secret can exist in combination of characteristics or components, each of which by itself is in public domain, there should be no trade secret protection, where combination of three steps—each of which is apparently common shop practice—seems to be determined by normal shop practice and alleged "owner" of trade secret expended no great effort to develop process, notwithstanding that knowledge of combined process benefited Air Force and "owner's" competitors under RFP disclosing process because it informed them that this particular process worked 537
Use by Government
Basis
Where Air Force exercises prerogative in determining that TF-30 blade shroud weld repair process contained in protester's unsolicited proposal is incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding, process in unsolicited proposal is not entitled to trade secret protection, since there is mix of private and Government funds in developing process 537
Evaluation of equipment, etc. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered)
Grants-in-aid
Status
Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion 575
Hospital management services
Advertising *v.* negotiation
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified 649
Labor stipulations
Wage underpayments
Claim priority
Contract provision
Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign 499

CONTRACTS—Continued
Negotiated. (*See* **CONTRACTS, Negotiation**)
Negotiation
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Auction technique prohibition
Disclosure of price, etc. Page

When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible 505

Authority

Series of General Accounting Office decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders—small business concerns—since restriction of competition under current law is not compatible with formal advertising 556

Award under initial proposals. (*See* **CONTRACTS, Negotiation, Competition, Award under initial proposals**)
Awards
Advantageous to Government
Price, etc.

Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request--alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest.. 675

Basis
Tested *v.* untested design

Agency's conclusion that protester's proposed use of untested design involved risk as measured against competitor's use of tested design is reasonable 635

Erroneous
Adjustment in price

Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct, but General Services Administration has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation 531

Not prejudicial to other offerors

Although agency's failure to point out specific deficiency to offeror was improper, award will not be disturbed where it appears that offeror was not materially prejudiced in view of significant technical and cost differences between it and successful offerors 473

CONTRACTS—Continued
Negotiation—Continued
Awards—Continued
Prejudice alleged
Not supported by record
Page
Record does not support allegation that agency treated certain aspects of competing proposals as deficiencies in one of them but not the other---- 473
Price determinative factor
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria---- 712
Procedural requirements
Noncompliance
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unorderd be resolicited-- 531
Propriety
Evaluation of proposals
Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion---- 473
Validity
Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, supbart B, section 201.11, which is virtually identical to "Buy American Act," 41 U.S.C. 10(a)-(e), is incorrect. While true that American Medical Instrument Corporation (AMICO) substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offeror will result in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award---- 531

CONTRACTS—Continued
Negotiation—Continued
Brand name or equal procurement Page
Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause 531
Buy American Act. (*See* **CONTRACTS, Buy American Act**)
Competition
Award under initial proposals
Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580
Data withheld
Allegation not supported by record
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals 635
Discussion with all offerors requirement
Deficiency in proposals
When discussions are held with offerors in competitive range, agency in most cases is required to inform offerors of all deficiencies and weaknesses in their respective proposals. Requirement extends to offeror whose proposal, as initially evaluated, is acceptable despite existence of some deficiencies, since offeror should be given opportunity to improve its proposal 473
Although agency's failure to point out specific deficiency to offeror was improper, award will not be disturbed where it appears that offeror was not materially prejudiced in view of significant technical and cost differences between it and successful offerors 473
Incumbent contractor
Competitive advantage
Prior decision, holding that erroneous estimate contained in request for proposals (RFP) misled offerors other than incumbent, is affirmed on reconsideration as arguments presented by incumbent do not alter prior determination that cost impact of erroneous estimate could not be predicted without reopening of negotiations 663
Indefinite, etc., specifications
Finding that RFP did not contain accurate estimate of file size will not have adverse effect on use of estimates in future procurements as alleged in request for reconsideration, as original decision did not hold that estimates must be precisely accurate but only that they be based on best information available to Government 663
Preservation of systems integrity
Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by General Accounting Office (GAO), mission of protecting health and safety of miners will be delayed for up to a year if recompetition results in termination of proposed award. Even assuming accuracy

CONTRACTS—Continued
Negotiation—Continued
Competition—Continued
Preservation of systems integrity—Continued

Page

of claimed costs and delays—which have not been explained or analyzed in detail—confidence in competitive procurement system mandates recompetition, where improperly awarded Automatic Data Processing (ADP) contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not 505

Conflicts of interest prohibitions
Status of offeror

Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper 745

Cost, etc., data
Escalation
Contractor *v.* subcontractor methods

Prime contractor was not required to negotiate with potential subcontractor as to method it used for calculating price escalation. Although method used by prime was different from that used by proposed subcontractor, GAO cannot object so long as it was reasonable and consistent with request for proposals (RFP) 596

Parametric cost estimating technique

Parametric and other cost estimating techniques may legitimately be used by agency to determine credibility of each offeror's production estimates and most probable cost to the Government 635

Cost-reimbursement basis
Cost proposals

Given essential equality of technical proposals, contracting officer's decision to award contract to offeror submitting slightly lower scored, significantly less-costly proposal did not give improper emphasis to cost, since decision merely applied common sense principle that if technical considerations are essentially equal, the only remaining consideration for selection of contractor is cost 725

Evaluation factors
Cost *v.* technical rating

Based on review of Department of Interior's evaluation record evidencing rationale for selection of cost-reimbursement contractor, General Accounting Office concludes that rationale is sound notwithstanding allegations that past experience and academic nature of protester ideally suited it to do study in question 725

Data, rights, etc. (*See* **CONTRACTS, Data, rights, etc.**)

CONTRACTS--Continued
Negotiation--Continued
Disclosure of price, etc.
Auction technique prohibition Page
When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible 505
Discussion requirement
Competition. (*See* **CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement**)
Evaluation factors
Administrative determination
Agency's conclusion that protester's proposed use of untested design involved risk as measured against competitor's use of tested design is reasonable 635
All offerors informed requirement
Where offeror's lack of "biomedical" research experience is identified as proposed weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion 473
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals 635
Conformability of equipment, etc.
Technical deficiencies, (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Escalation
Time frame
Allegation that time frame for calculating price escalation should be different from that used in evaluatiing protester's proposal is denied since time frame used is that specified in RFP 596
Evaluators
Board membership
Federal Procurement Regulations para. 1-4.1004-1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721
Conflict of interest alleged
Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement 580

CONTRACTS—Continued
Negotiation—Continued
Evaluation factors—Continued
Evaluators—Continued
Conflict of interest—Continued Page

Although it would have been appropriate for proposal evaluator to have disqualified himself completely from proposal evaluation upon notice that proposal had been received from former employer who had previously fired employee, fact remains that evaluator insists he did not discuss former employer's submitted proposal until fellow evaluators completed evaluation. Since protester has not submitted probative evidence contesting evaluator's statements and because relative standing of offerors is unchanged by excluding questioned evaluator's scores, new evaluation panel need not be convoked to rescore proposals to remedy irregularity 580

Technical evaluation panel
Board membership

Evaluation of revised proposals by some but not all of those who evaluated original proposals, without discussion among evaluators of their respective judgments, is not contrary to applicable regulations or otherwise improper 473

Method of evaluation
Formula

Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712

Technical proposals
Architect-engineer contracts

Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits 721

Propriety of evaluation

Protester concludes, based on telephone conversations before and after award between successful offeror and itself, in which the possibility of protester working with successful offeror on project was discussed, that successful offeror was not completely staffed and should have been found unacceptable. Examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in evaluation of proposal since during negotiations successful offeror properly filled staff requirements from other firms 745

Fixed-price
Cost data, etc. (*See* **CONTRACTS, Negotiation, Cost, etc., data**)

CONTRACTS—Continued
Negotiation—Continued
Impossibility of drafting specifications
Basis for exception to formal advertising Page
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified 649
Lowest offer
Price and other factors considered
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit 745
Offers or proposals
Best and final
Additional rounds
Auction technique not indicated
Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique 712
Discussions
Disclosure
To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester 505
"Most advantageous to Government"
Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest 675
Written notification
Prior to discussions, agency's letter advised offerors of the opportunity to submit revised proposals after discussions. The same advice was repeated in oral discussions. Agency failed to fully comply with Armed Services Procurement Regulation 3-805.3(d) (1976 ed.), because there

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued
Written notification—Continued Page
was no subsequent written notification to offerors that discussions were disclosed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award 675
Defective proposals
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range 694
Deficient proposals
Contradicting evidence not submitted
Since contracting officer insists that protester "was advised that their proposal was top heavy (too many Ph.D's), with too high number of man-hours," and because protester has not submitted probative evidence contradicting position, adequate discussions were held with company concerning alleged deficiencies 725
Deviations
Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided 694
Substitution
Beyond contemplation of solicitation requirements
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited 531

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Essentially equal technically
Price determinative factor Page

Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712

Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique 712

Based on review of Department of Interior's evaluation record evidencing rationale for selection of cost-reimbursement contractor, General Accounting Office concludes that rationale is sound notwithstanding allegations that past experience and academic nature of protester ideally suited it to do study in question 725

Given essential equality of technical proposals, contracting officer's decision to award contract to offeror submitting slightly lower scored, significantly less-costly proposal did not give improper emphasis to cost, since decision merely applied common sense principle that if technical considerations are essentially equal, the only remaining consideration for selection of contractor is cost 725

Evaluation
Allegation of bias not sustained

Record does not support allegation that agency treated certain aspects of competing proposals as deficiencies in one of them but not the other 473

Initial proposal basis
Authority for award

Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580

Offeror
Qualifications. (*See* CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors)
Superior rated proposal

Since successful offeror's superior-rated proposal was properly considered for initial proposal award in that tests for award were met, it was proper for procuring agency not to have discussed with protester deficiencies noted in protester's proposal—indeed, if discussions had been entered into, initial award would not have been authorized 580

Preparation
Costs

Claim for proposal preparation costs is denied where lack of good faith, arbitrariness or capriciousness is not shown 596

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Qualifications of offerors
Experience Page

Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion ---- 473

Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration ---- 712

License requirement

Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license ---- 494

Revisions
Cut-off date

Prior to discussions, agency's letter advised offerors of the opportunity to submit revised proposals after discussions. The same advice was repeated in oral discussions. Agency failed to fully comply with Armed Services Procurement Regulation 3-805.3(d) (1976 ed.), because there was no subsequent written notification to offerors that discussions were closed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award ---- 675

Equal opportunity to all offerors

Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest ---- 675

Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and, based upon record, GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal ---- 675

Superior rated proposal. (*See* **CONTRACTS, Negotiation, Offers or proposals, Superior rated proposal**)

CONTRACTS—Continued
Negotiation—Continued
Offers or proposals—Continued
Unacceptable proposals
Prices not fixed Page

On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range 694

Unsolicited proposals
Status

Acceptance of protester's unsolicited proposal is not dispositive that TF-30 blade shroud repair process set out in proposal was proprietary data and that Government violated protester's rights by disclosing process in subsequently issued RFP, where acceptance was caused by administrative error and proposal's restrictive legend recognizes that nonproprietary common shop practices or process independently developed by Government or another firm are not protected against disclosure by Government 537

Options
Generally. (*See* **CONTRACTS, Options**)
Prices
Comparison
Method of calculation

Prime contractor was not required to negotiate with potential subcontractor as to method it used for calculating price escalation. Although method used by prime was different from that used by proposed subcontractor, GAO cannot object so long as it was reasonable and consistent with request for proposals (RFP) 596

Error alleged
Not supported by record

Protester's allegation of fundamental error in calculation of price escalation is not sustained by record which shows that evaluation was reasonable and that even if evaluation were conducted as requested by protester, its proposal would not be low 596

Proposals essentially equal technically

Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712

Technical status of low offeror

Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration 712

CONTRACTS—Continued
Negotiation—Continued
Pricing data. (*See* Contracts, Negotiation, Cost, etc., data)
Protests Page
Requests for proposals. (*See* CONTRACTS, Negotiation, Requests for proposals, Protests under)
Reopening
Estimates
Best information available requirement
Prior decision, holding that erroneous estimate contained in request for proposals (RFP) misled offerors other than incumbent, is affirmed on reconsideration as arguments presented by incumbent do not alter prior determination that cost impact of erroneous estimate could not be predicted without reopening of negotiations 663
Requests for proposals
"All or none" proposals
Request for proposals (RFP) contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in the future, oral amendments to solicitations be confirmed in writing 513
Computer time sharing services
Requirements
Memory allocation
Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided 694
Protests under
Allegation of arbitrary and capricious action not substantiated
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit 745
Allegation of misrepresentation in awardee's proposal
Not substantiated
Protester concludes, based on telephone conversations before and after award between succesful offeror and itself, in which the possibility of protester working with successful offeror on project was discussed, that successful offeror was not completely staffed and should have been found unacceptable. Examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in evaluation of proposal since during negotiations successful offeror properly filled staff requirements from other firms 745

CONTRACTS—Continued
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Timeliness Page

Issue first raised 4 months after protest was filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits. 712

Solicitation improprieties

Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. 20.2(c) (1976) 674

Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R. 20.2(c) (1976) 675

Specification requirements
Off-site and on-site testing

Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675

Variation from requirements

On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range 694

Small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Specifications. (*See* **CONTRACTS, Specifications**)

Specifications conformability. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

CONTRACTS—Continued
Negotiation—Continued
Support services procurements
Research and development governing statutes not applicable Page
Despite erroneous coding of procurement as one for research and development (R&D), statute governing evaluation of proposals leading to award of R&D contract is not applicable where procurement is actually for support services 473
Technical acceptability of equipment, etc., offered. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)
Technical evaluation panel
Members
Absence
Evaluation of revised proposals by some but not all of those who evaluated original proposals, without discussion among evaluators of their respective judgments, is not contrary to applicable regulations or otherwise improper 473
Membership source
Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits 721
Federal Procurement Regulations para. 1-4.1004-1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721
Termination. (*See* **CONTRACTS, Termination**)
Options
Failure to exercise *v.* costs
Contention without merit
Contention that failure to exercise option years of contract will result in Navy's incurring substantial termination for convenience costs is without merit, since authority cited (*Manloading & Management Associates, Inc.* v. *United States*, 461 F. 2d 1299 (Ct. Cl. 1972)) involved estoppel situation where Government gave unequivocal assurances that contract option would be exercised. Present case involved mere assurance that options would be exercised subject to eventualities normally associated with year-to-year funding, and is distinguishable on other grounds as well 694
Hospital management services
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified 649

CONTRACTS—Continued
Options—Continued
Not to be exercised
Not in Government's best interest Page
Contractor and agency suggest that no recommendation for corrective action would be appropriate despite prior decision sustaining protest, because contract performance complies with requirements and protester suffered no prejudice. However, while some evidence in record indicates that contractor is providing "read protection" in computer timesharing services contract, written record does not establish that contract performance is fully in compliance with requirements, nor is it General Accounting Office's (GAO) function to make such determination. In any event, best interests of Government call for recommendation that contract option years not be exercised. 56 Comp. Gen. 245, modified..... 694
Payments
Bankrupt contractor
Rights of unpaid workers *v.* trustee in bankruptcy
Courts, as well as this Office, recognize that unpaid laborers have equitable right to be paid from contract retainages and unpaid workers would have higher priority to funds withheld from amounts owing contractor than would trustee in bankruptcy..... 499
Set-off. (*See* **SET-OFF, Contract payments, Bankrupt contractor**)
Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)
Protests
Allegation of error in price escalation calculation
Not supported by record
Protester's allegation of fundamental error in calculation of price escalation is not sustained by record which shows that evaluation was reasonable and that even if evaluation were conducted as requested by protester, its proposal would not be low..... 596
Allegation of unfairness
Not supported by record
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals..... 635
Allegations
Burden of proof
On protester
Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps..... 537

CONTRACTS—Continued
Protests—Continued
Conflict in statements of contractor and contracting agency Page
Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and, based upon record, GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal 675
Court solicited aid
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487
Persons, etc., qualified to protest
Interested parties
Potential subcontractors excluded
Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed 730
Procedures
Bid Protest Procedures
Improprieties and timeliness
Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. 20.2(c) (1976) ... 675
Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R. 20.2(c) (1976) 675
Subcontractor protests
General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor 596
Timeliness
Basis of protest
Date made known to protester
Since protester's contention that it only became aware of protest when it learned facts concerning contents of successful proposal is reasonable and not refuted, limitation on filing begins to run from that time and protest is timely 505
Negotiated contracts
Issue first raised 4 months after protest was filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits 712

CONTRACTS—Continued
Protests—Continued
Timeliness—Continued
Negotiated contracts—Continued
Debriefing on proposal Page
Protest concerning defects in successful proposal is untimely filed since it was received more than 10 working days after protester received debriefing on proposal. Other bases of protest are timely filed..... 580
Significant issue exception
Evaluation formula
Government's formula for evaluating bids which does not reflect anticipated requirements raises significant issue notwithstanding agency's view that protest is untimely..... 668
Requirements
Government obligation
Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency..... 689
Research and development
Governing statutes not applicable to support services procurements
Despite erroneous coding of procurement as one for research and development (R&D), statute governing evaluation of proposals leading to award of R&D contract is not applicable where procurement is actually for support services..... 473
Set-asides
Awards to small business concerns. (*See* CONTRACTS, Awards, Small business concerns, Set-asides)
Specifications
Adequacy
Negotiated procurement
While it is alleged that requirement for standardization of encoding scheme for data base to that developed by contractor under questionable award will effectively preclude potential offerors other than incumbent from competing, such requirement is not unduly restrictive where, as here, need for standardization has been demonstrated as legitimate..... 663
Aggregate *v.* separable items
Options to contractor
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qulification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition..... 487
Brand name or equal. (*See* CONTRACTS, Specifications, Restrictive, Particular make)

CONTRACTS—Continued
Specifications—Continued
Conformability of equipment, etc., offered
Administrative determination
Negotiated procurement Page
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit---------- 745
Technical deficiencies
Negotiated procurement
Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps---------- 537
Where Air Force exercises prerogative in determining that TF-30 blade shroud weld repair process contained in protester's unsolicited proposal is incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding, process in unsolicited proposal is not entitled to trade secret protection, since there is mix of private and Government funds in developing process---------- 537
Tests
Evaluation
General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable---------- 689
Prior procurements
Test waived
Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate---------- 689
Specification requirements
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis---------- 675

CONTRACTS—Continued
Specifications—Continued
Defective
Corrective action recommended Page
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497
Deficient provisions
Other bidders not prejudiced
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487
Definiteness requirement
Variance justification
Finding that RFP did not contain accurate estimate of file size will not have adverse effect on use of estimates in future procurements as alleged in request for reconsideration, as original decision did not hold that estimates must be precisely accurate but only that they be based on best information available to Government 663
Descriptive data
Failure to submit
Model number and descriptive literature
Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid 608
Deviations
Descriptive literature
Brand name or equal item
Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause 531
Failure to furnish something required
Descriptive data. (*See* **CONTRACTS, Specifications, Descriptive data**)
Licensing-type requirement
Specific license
Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license 494

CONTRACTS—Contiued
Specifications—Continued
Proprietary data use. (*See* CONTRACTS, Data, rights, etc.)
Restrictive
Adequacy of specifications
Page
While it is alleged that requirement for standardization of encoding scheme for data base to that developed by contractor under questionable award will effectively preclude potential offerors other than incumbent from competing, such requirement is not unduly restrictive where, as here, need for standardization has been demonstrated as legitimate---- 663
Particular make
Description availability
Bids were properly rejected where information reasonably available to procuring activity was not sufficient to establish that protesters' offered products were "equal" to the brand name items specified in the invitation for bids---- 608
"Or equal" product acceptability
Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid---- 608
Salient characteristics
Absence of empirical evidence for need
In absence of empirical evidence that brand-name item has salient characteristic supposedly representing Air Force's minimum need, and in view of brand-name offeror's specific exception to that characteristic, General Accounting Office (GAO) advises Air Force that no further deliveries of brand-name item should be accepted until item's compliance with salient characteristic is established through actual demonstration-- 513
Unduly restrictive
Protester's contention that listed salient characteristic of brand-name item is unduly restrictive is sustained where even offeror of brand name item took exception to requirement---- 513
Special design features
Specification provision which excluded particular design is without a reasonable basis where rationale for exclusion appears founded on erroneous concept of design---- 513
Review of specifications
Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases---- 575
Samples
Tests to determine product acceptiability
Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency---- 689

CONTRACTS—Continued
Specifications—Continued
Technical deficiencies. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies)
Tests
Conformability of equipment offered to specifications, (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests)
First article
Armed Services Procurement Regulation control Page
Armed Services Procurement Regulation 1-1903 (a)(iii) controls both first article testing and initial production testing 689
Initial production testing
Waiver
Decision to grant waiver of initial production testing is matter of administrative discretion to which GAO will not object in absence of clear showing of arbitrary or capricious conduct on part of procuring officials.. 689
Necessary amount of testing
Administrative determination
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675
General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable 689
Waiver
Invitation provision
Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate 689
Status
Federal grants-in-aid
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487

CONTRACTS—Continued
Status—Continued
Separable or aggregate
Awards. (*See* CONTRACTS, Awards, Separate or aggregate)
Subcontractors
Buy American Act. (*See* BUY AMERICAN ACT)
Protests Page
General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor 596
Interested party requirement
Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed 730
Subcontracts
Buy American Act. (*See* BUY AMERICAN ACT)
Tax matters
Set-off. (*See* SET-OFF, Contract payments, Tax debts)
Termination
Convenience of Government
Erroneous awards
Deleterious effect of termination
Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by General Accounting Office (GAO), mission of protecting health and safety of miners will be delayed for up to a year if recompetition results in termination of proposed award. Even assuming accuracy of claimed costs and delays—which have not been explained or analyzed in detail—confidence in competitive procurement system mandates recompetition, where improperly awarded Automatic Data Processing (ADP) contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not 505
Reporting to Congress
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited .. 531
Solicitation inappropriate
Unduly restrictive of competition
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497
Timber sales. (*See* TIMBER SALES, Contracts)
Trade secrets. (*See* CONTRACTS, Data, rights, etc., Trade secrets)

CORPORATIONS
Officers
Debts
Corporation not liable Page

Where president of corporation leaves corporation and enters into several contracts with Government, as individual, claims against individual arising out of contracts may not be set off against funds withheld from amount owing corporation under contract which was signed by individual in his capacity as president of corporation 499

CORPS OF ENGINEERS (*See* **ARMY DEPARTMENT, Corps of Engineers**)

COURTS
Judgments, decrees, etc.
Against officers and employees
Liability of Government

Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled 615

Payment
Agency appropriations
Propriety

The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled 615

Appropriation chargeable

If judgment is entered against United States or one of its agencies as employer-garnishee under applicable state law, that judgment may be paid from the Judgment Appropriation created by 31 U.S.C. 724a, if Attorney General certifies that it is in the interest of the United States to pay the judgment 592

State
Jurisdiction
Garnishment proceedings

Environmental Protection Agency negligently failed to withhold specified amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592

DEBT COLLECTIONS
Waiver
Military personnel
Pay, etc.
Readjustment pay Page
Where Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774--- 587
DEPARTMENTS AND ESTABLISHMENTS
Services between
Sale/transfer of surplus/excess property
Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c)---------- 754
DETAILS
Extensions
Civil Service Commission approval
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award-- 732
DISTRICT OF COLUMBIA
Leases, concessions, rental agreements, etc.
Hotel accommodations
Subject to statutory prohibitions
Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn---- 572
EDUCATION
Colleges, schools, etc. (*See* COLLEGES, SCHOOLS, ETC.)
Federal aid, grants, etc., to States. (*See* STATES, Federal aid, grants, etc., Educational institutions)

EDUCATION—Continued
Student assistance programs
Military record correction effect on allowance Page
Whether or not erroenous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587
EQUIPMENT
Automatic Data Processing Systems
Computer service
Benchmarking
Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not resaonably determine from proposal whether full read protection was offered and how it would be provided 694
Programming
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675
Leases
Long-term
To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester 505
Contractor and agency suggest that no recommendation for corrective action would be appropriate despite prior decision sustaining protest, because contract performance complies with requirements and protester suffered no prejudice. However, while some evidence in record indicates that contractor is providing "read protection" in computer timesharing services contract, written record does not establish that contract performance is fully in compliance with requirements, nor is it General Accounting Office's (GAO) function to make such determination. In any event, best interests of Government call for recommendation that contract option years not be exercised. 56 Comp. Gen. 245, modified 694

ESTOPPEL
Prior actions Page
Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, contractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver of contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract 459
ETHICS
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Ethics**)
FEDERAL GRANTS, ETC.
Grantee contracts
Review by General Accounting Office
Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion 575
FEDERAL PROCUREMENT REGULATIONS
Negotiated procurement
Architect-engineer evaluation boards
Private practitioners requirement
Federal Procurement Regulations para. 1–4.1004–1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721
FEDERAL WATER POLLUTION CONTROL ACT
Grants-in-aid
Contracts
Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases 575
FLY AMERICA ACT
Applicability to air travel. (*See* **TRAVEL EXPENSES, Air travel, Fly America Act, Applicability**)
FOREIGN GOVERNMENTS
License requirements for Government contractors. (*See* **LICENSES, Federal, State, etc., Government contractors**)
FOREST SERVICE
Timber sales. (*See* **TIMBER SALES**)

FUNDS
Advance
Federal aid, grants, etc. Page
Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency 567
Appropriated. (*See* **APPROPRIATIONS**)
Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)
Revolving
Augmentation
Sale/transfer of surplus/excess property
Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754
GARNISHMENT
Federal funds
State laws
If judgment is entered against United States or one of its agencies as employer-garnishee under applicable state law, that judgment may be paid from the Judgment Appropriation created by 31 U.S.C. 724a, if Attorney General certifies that it is in the interest of the United States to pay the judgment 592
Officers and employees
Compensation
Alimony and child support
Environmental Protection Agency negligently failed to withhold specified amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592
GENERAL ACCOUNTING OFFICE
Decisions
Overruled or modified
Prospective application
Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Overruled or modified—Continued
Prospective application—Continued

Page

work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified 551

This decision relating to reimbursement of legal fees incurred for real estate transactions is prospective only; it may not be applied where the settlement of the transaction occurred prior to date of decision 561

Jurisdiction
Contracts
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions

Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility criteria are not being applied 689

Grants-in-aid

Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion 575

Protests generally. (*See* **CONTRACTS, Protests**)

Subcontracts

General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor 596

Recommendations
Contracts
Agency review of technical/cost justification for award

Notations on successful offeror's cost proposal show that Department of Interior complied with minimal regulatory requirements mandating cost analysis as concerns examination of necessity and resonableness of proposed costs 725

Amendments
Oral
Confirmation in writing

Request for proposals (RFP) contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in the future, oral amendments to solicitations be confirmed in writing 513

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Prior recommendation
Feasibility questioned Page
Possible administrative difficulties attending recompetition of improper award in determining performance period, residual value of offered equipment, and treatment of services already performed by incumbent contractor do not constitute reasons to change prior recommendation for recompetition 505
Modified
Changed requirements
Prior recommendation in 56 Comp. Gen. 402 that negotiations be reopened because of impossibility of ascertaining price impact of misleading Government estimate is modified to permit agency to not exercise option under current contract and to resolicit offers under new solicitation because of changed Government requirements since issuance of original decision 663
Lapse of time
Requests for reconsideration have not shown errors of fact or law in prior decision sustaining protest, and decision's recommendation for corrective action—reopening negotiations—was correct at time it was made. Due solely to amount of time consumed by contractor's, agency's and protester's requests for reconsideration, and in view of approaching expiration of current contract term, GAO now changes recommendation: instead of reopening negotiations, Navy should not exercise two option years in current contract and should resolicit computer time-sharing services competitively. 56 Comp. Gen. 245, modified 694
Recompetition of procurement
Administrative difficulties no deterrent
Possible administrative difficulties attending recompetition of improper award in determining performance period, residual value of offered equipment, and treatment of services already performed by incumbent contractor do not constitute reasons to change prior recommendation for recompetition 505
Resolicitation under revised specifications
Termination of awarded contract if necessary
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497
Termination of awarded contract, etc.
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Resolicitation under revised specifications—Continued
Termination of award contract, etc.—Continued Page

literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited. 531

Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668

GENERAL SERVICES ADMINISTRATION
Services for other agencies, etc.
Sale/transfer of surplus/excess property

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754

GRANTS
To States. (*See* STATES, Federal aid, grants, etc.)
HAWAII
Station allowances
Military personnel. (*See* STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.)
HOLIDAYS
Annual leave charge. (*See* LEAVES OF ABSENCE, Holidays)
HOSPITALS
Management services
Contracts
Advertising *v.* negotiation

Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified. 649

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Deputy Federal Insurance Administrator. (*See* **HOUSING AND URBAN DEVELOPMENT DEPARTMENT**, Federal Insurance Administrator, Deputy)
Federal Insurance Administrator
Acting
Appointment
Limitation Page

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345–3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator 761

Deputy
Status and authority

Although the Acting Insurance Administrator was appointed Deputy Administrator on May 23, 1977, which job requires the Deputy to act in place of the Administrator during his absence or inability to act, this duty may not be performed until a new Administrator has been confirmed since maximum statutory period of 30 days to fill such vacancy under the Vacancies Act has already been exhausted 761

Validity of decisions
Unauthorized period of service

Validity of decisions made by the Acting Federal Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future 761

Loans and grants
Use of HUD community block grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

INDIAN AFFAIRS
Tribal rights
Indian and non-Indian lands acquired for Oahe Dam
Grazing rights

As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83–776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different

INDIAN AFFAIRS—Continued
Tribal Rights—Continued
Indian and non-Indian Lands Acquired for Oahe Dam—Continued
Grazing Rights—Continued Page
term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B-142250, May 2, 1961, overruled ---- 655
INTERIOR DEPARTMENT
Contracts
Costs
Analysis
Evaluation factors
Notations on successful offeror's cost proposal show that Department of Interior complied with minimal regulatory requirements mandating cost analysis as concerns examination of necessity and reasonableness of proposed costs ---- 725
INTERNAL REVENUE SERVICE
Employees
Liability for Government losses
Tax suit damages and costs
The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled ---- 615
Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled ---- 615
The liability of a Government officer or employee for punitive damages under section 7217, I.R.C. (1954), may be assumed by the United States under section 7423(2), I.R.C. (1954), provided it is administratively determined that the officer or employee was acting in the due performance of his official duties at the time the unauthorized disclosure was made. 40 Comp. Gen. 95 and other similar decisions, overruled ---- 615

INTERNAL REVENUE SERVICE—Continued
Tax matters
Disability retired pay
Excluded from gross income for tax purposes Page

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement 740

JUDGMENTS, DECREES, ETC.
Courts. (*See* **COURTS, Judgments, decrees, etc.**)

LABOR DEPARTMENT
Bureau of Labor Statistics
Consumer price index
Food prices
Subsistence
Relocation expenses

Transferred employee seeking reconsideration of General Accounting Office decision limiting reimbursement of temporary quarters subsistence expenses to Department of Labor Statistics for family of four persons submits further evidence concerning family composition. Since older child is age 17, maximum allowable subsistence amount may be adjusted upward in accordance with Bureau of Labor Statistics equivalence scales. 55 Comp. Gen. 1107 (1976) amplified 604

LEASES
Automatic Data Processing Systems
Equipment. (*See* **EQUIPMENT, Automatic Data Processing Systems, Leases**)

LEAVES OF ABSENCE
Annual
Forfeiture. (*See* **LEAVES OF ABSENCE, Forfeiture**)
Holidays
Charging precluded
Within regularly scheduled tour of duty
Employees receiving premium pay

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified 551

LEAVE of ABSENCE—Continued
Annual—Continued
Holidays—Continued
Premium pay
Regularly scheduled tour of duty Page

In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision 551

Forfeiture
Scheduling requirement

Annual leave forfeited at end of 1974 leave year allegedly due to exigencies of the public business but not scheduled in advance may not be restored under 5 U.S.C. 6304(d)(1), even if employees did not have actual notice of scheduling requirement and it was known in advance that leave would not be granted if scheduled. Scheduling is a statutory requirement which may not be waived and failure to give actual notice of this requirement is not administrative error since employees are charged with constructive notice of it 470

Military personnel
Payment for unused leave on discharge, etc.
Adjustment on basis of record correction

Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970) 587

Traveltime
Rest periods

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination 629

LICENSES
Federal, State, etc.
Government contractors

Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license 494

Offeror qualifications
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors**)

MEETINGS
Rental of conference rooms
Prohibition Page
Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn 572
MILEAGE
Helicopter
Helitack mission formula
Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671
MILITARY PERSONNEL
Allowances
Station. (*See* **STATION ALLOWANCES**)
Annuity elections for dependents
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Correction of military records. (*See* **MILITARY PERSONNEL, Record correction**)
Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside the United States, etc.**)
Disability retired pay. (*See* **PAY, Retired, Disability**)
Education. (*See* **EDUCATION**)
Pay. (*See* **PAY**)
Record correction
Back pay
Deduction of interim earnings, etc. (*See* **MILITARY PERSONNEL, Record correction, Payment basis, Interim civilian earnings**)
Discharge change as entitlement to pay, etc.
Educational assistance allowance adjustment
Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587
Overpayment liability
Interim Reserve pay and allowances
Army members separated from extended active duty, who thereafter earn military pay and allowances as members of Reserve components, but whose records are corrected to reflect continued active duty with no break in service, are liable to repay such interim Reserve pay and allowances 587

MILITARY PERSONNEL—Continued
Record correction—Continued
Overpayment liability—Continued
Payment for unused leave on discharge Page
Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970)---- 587
Where Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774---- 587
Readjustment payments
Army Reserve officers involuntarily separated from active duty, with readjustment payments computed under 10 U.S.C. 687 (1970), whose military records are subsequently corrected to show continuation on active duty, are liable to repay such readjustment payments to the United States---- 587
Payment basis
Interim civilian earnings
Army members separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; and while interim civilian earnings may properly be set off against amounts due members, such civilian earnings are deductible only from net balance due members after setoff of their debts to the Government and are not recoupable in excess of that net balance---- 587
Retired pay. (*See* **PAY, Retired**)
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)
OFFICERS AND EMPLOYEES
Appointments. (*See* **APPOINTMENTS**)
Compensation. (*See* **COMPENSATION**)
De facto
Compensation
Reasonable value of services performed
It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of the Secretary and the President and may be considered a *de facto* employee, entitled to reasonable value of his services which equates to same amount as his salary---- 761

OFFICERS AND EMPLOYEES—Continued
Details. (*See* **DETAILS**)
Ethics
Procurement employees
Evaluators Page

Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement..... 580

Handicapped
Attendants
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Attendants, Handicapped employees**)
Travel expenses. (*See* **TRAVEL EXPENSES, Private parties, Attendants, Handicapped employees**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)
Liability
Judgments against. (*See* **COURTS, Judgments, decrees, etc., Against officers and employees**)
Moving expenses
Relocation of employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Overseas
Per diem. (*See* **SUBSISTENCE, Per diem, Overseas employees**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Premium pay
Leaves of absence
Holidays

In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision..... 551

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified..... 551

OFFICERS AND EMPLOYEES—Continued
Promotions
Compensation. (*See* **COMPENSATION, Promotions**)
Temporary
Detailed employees Page
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award 732
Quarters allowance
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)
Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Service agreements
Failure to fulfill contract
Separated for deficiencies in work performance
Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination 606
Travel expenses. (*See* **TRAVEL EXPENSES, Failure to fulfill contract**)
Severance pay
Compensation. (*See* **COMPENSATION, Severance pay**)
Eligibility
Temporary appointment subsequent to reduction-in-force
Upon involuntary separation by reduction in force from permanent position, employee was appointed without break in service to full-time temporary position with another agency. Employee is entitled to have severance pay computed on basis of basic pay at time of separation from permanent postition, but years of service and age should be determined as of termination of temporary position because full-time temporary appointment is employment with a definite time limitation within meaning of 5 U.S.C. 5595(a)(2)(ii) 750
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem**)
Relocation expenses for transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters Subsistence expenses**)

OFFICERS AND EMPLOYEES—Continued
Training
Expenses
Meals and rooms at headquarters Page

Decision of September 10, 1974, B-159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn 572

Transfers
Relocation expenses
Administrative determinations
Budget constraints

An employee was denied relocation expenses incident to transfer from Philadelphia to Mechanicsburg, Pennsylvania, on the basis that budget constraints precluded reimbursement. The record fails to show that the agency made a determination as to whether transfer was in Government's interest. Federal Travel Regulations, para. 2-1.3 (May 1973), require that determination be made as to whether transfer is in Government's interest or primarily for convenience or benefit of employee or at his request. Our decisions provide guidelines to assist agencies in reaching such determinations. Here, employee is not entitled to reimbursement for relocation expenses since he applied for and otherwise took initiative in obtaining transfer 709

Attorney fees
House purchase and/or sale

Necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by reason of the purchase or sale of a residence incident to a permanent change of station constitute "similar expenses" within the meaning of Federal Travel Regulations para. 2-6.2c (May 1973). Such costs may be reimbursed, provided they are within the customary range of charges for such services in the locality of the residence transaction. B-161891, August 21, 1967; 48 Comp. Gen. 469 (1969); and similar cases no longer to be followed regarding attorney fees 561

Preparing conveyances, other instruments, and contracts
Purchase and/or sale of house not consummated

Because legal fees and costs associated with unsuccessful efforts to sell are analogous to statutorily unreimbursable losses due to market conditions, rule denying payment of such fees and costs is not changed. Accordingly, claim of transferred employee for attorney's fee for preparation of affidavit of title relative to unsuccessful sales effort may not be paid 561

Single fee
Customary charges in locality of residence transaction

Since the cost of legal services normally rendered in the locality of the transaction may be reimbursed, a single overall fee charged may be paid without itemization if it is within the customary range of charges in that locality. B-163203, March 24, 1969; B-165280, December 31, 1969; and similar cases modified 561

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Subsistence expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters, Subsistence expenses**)
Temporary quarters
Subsistence expenses
Reasonableness of meal costs Page

Transferred employee seeking reconsideration of General Accounting Office decision limiting reimbursement of temporary quarters subsistence expenses to Department of Labor Statistics for family of four persons submits further evidence concerning family composition. Since older child is age 17, maximum allowable subsistence amount may be adjusted upward in accordance with Bureau of Labor Statistics equivalence scales. 55 Comp. Gen. 1107 (1976) amplified 604

Vacating residence requirement

Transferred employee arranged in advance to rent former residence after date of closing on sale because temporary quarters, although available, were expensive and not convenient. Claim for temporary quarters subsistence expenses for period of continued occupancy of former residence may not be certified for payment since the residence at the old duty station was not vacated within the meaning of Federal Travel Regulations para. 2-5.2c 481

Service agreements
Other than transfers. (*See* **OFFICERS AND EMPLOYEES, Service agreements**)
Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers**)
Travel expenses. (*See* **TRAVEL EXPENSES**)
Traveltime
Hours of travel
Regular *v.* nonduty hours
Application of Fly America Act

Where the only certificated air carrier service available between points in the United States and points outside the United States requires boarding or leaving the carrier between midnight and 6 a.m., or travel spanning those hours, the employee is required by 49 U.S.C. 1517 to use such service insofar as otherwise available under the Comptroller General's Guidelines of March 12, 1976, and decisions of this Office. 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel*, modified 629

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination 629

Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)

PAY

Civilian employees. (*See* COMPENSATION)

Retainer

Navy or Marine Corps members

Entitlement

On or after January 1, 1971 Page

Under 10 U.S.C. 1401a(f) (Supp. V, 1975) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as result of disciplinary action--- 740

Retired

Disability

Computation

Method

Application of Act of October 7, 1975 (Pub. L. 94-106)

Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U.S.C. 6330 (1970), adjusted to reflect any applicable changes authorized by 10 U.S.C. 1401a (1970), if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U.S.C. 1401a(f) (Supp. V, 1975)---------- 740

Rate computed on nondisability formula

Excluded from gross income for tax purposes

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement---------- 740

Survivor Benefit Plan

Dependency and indemnity compensation

Refund entitlement

Computation

Where widow's Survivor Benefit Plan (SBP) annuity is reduced pursuant to 10 U.S.C. 1450(c), by the award of Dependency and Indemnity Compensation (DIC), the computation of cost of the reduced annuity in order to determine amount of any refund due the widow pursuant to 10 U.S.C. 1450(e) is to be done on a monthly basis and shall include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death---------- 482

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Spouse
Termination or reduction
Refunds Page

Where a surviving spouse receives the full amount of selected SBP annuity for any period because an award of DIC could not be made retroactive to the date of death, since recalculation of SBP annuity pursuant to 10 U.S.C. 1450(c) and (e) is permitted only when annuity is reduced by DIC award effective "upon the death" of the retiree, no refund is due ---------- 482

Survivor Benefit Plan. (*See* PAY, Retired, Survivor Benefit Plan)

Waiver of overpayments. (*See* DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.)

PAYMENTS
Advance
Wages due students under College Work-Study Program

Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency ---------- 567

PRESIDENT
Presidential appointees
Federal Insurance Administrator

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345–3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator ---------- 761

PROPERTY
Public
Surplus
Transfer to Government agencies
Proceeds disposition

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) ---------- 754

Surplus. (*See* PROPERTY, Public, Surplus)

PROTESTS
Contracts. (*See* **CONTRACTS, Protests**)
PUBLIC LANDS
Leases
Former Indian lands
Page
As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83–776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B–142250, May 2, 1961, overruled 655
REGULATIONS
Amendment
Effect on prior rights
A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibited) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it 525
RETIREMENT
Military personnel
Retired pay. (*See* **PAY, Retired**)
SALES
Surplus. (*See* **PROPERTY, Public, Surplus**)
SCHOOLS, COLLEGES, ETC. (*See* **COLLEGES, SCHOOLS, ETC.**)
SET-OFF
Contract payments
Assignments
Labor stipulation violations
Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign 499
Tax debts
While IRS is entitled to setoff against assignee-Bank any of its claims against assignor-contractor which matured prior to assignment, agency may not set off claims which matured subsequent to assignment 499

SET-OFF—Continued
Contract payments—Continued
Bankrupt contractor
Assignee *v.* trustee Page
Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer---------- 499
Unpaid workers *v.* trustee in bankruptcy
Courts, as well as this Office, recognize that unpaid laborers have equitable right to be paid from contract retainages and unpaid workers would have higher priority to funds withheld from amounts owing contractor than would trustee in bankruptcy---------- 499
Corporation not liable for debts of officers
Where president of corporation leaves corporation and enters into several contracts with Government, as individual, claims against individual arising out of contracts may not be set off against funds withheld from amount owing corporation under contract which was signed by individual in his capacity as president of corporation---------- 499
Tax debts
Federal tax lien, unrecorded as of time of bankruptcy, is invalid against trustee in bankruptcy which would have priority to funds withheld from amount owed bankrupt contractor under contract------ 499
SMALL BUSINESS ADMINISTRATION
Contracts
Awards to small business concerns. (*See* CONTRACTS, Awards, Small business concerns)
STATES
Federal aid grants, etc.
Educational institutions
Student assistance programs
Plan assuring college education (PACE)
North Carolina
Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency---------- 567
Matching fund activities
Grant used for additional matching
Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States---------- 645

STATION ALLOWANCES
Military personnel
Excess living costs outside United States, etc.
Dependents
Move concurrent with member's restricted duty Page

A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibited) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it 525

SUBCONTRACTORS
Generally. (*See* CONTRACTS, Subcontractors)

SUBSISTENCE
Per diem
Attendants
Handicapped employees

Physically handicapped individual, confined to wheelchair, serving without compensation on Commerce Technical Advisory Board may be reimbursed for travel expenses of wife who accompanied him as attendant on official travel. Based on Federal Government's policy of nondiscrimination because of physical handicap set forth in 5 U.S.C. 7153 (1970) and 29 U.S.C. 791 (1975), where agency determines that handicapped employee, who is incapable of traveling alone, should perform official travel, travel expenses of escort are necessary expenses of travel 661

Overseas employees
Delays
Use of certificated air carriers.

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination 629

Reduction
Government to reserve hotel accommodations

Decision of September 10, 1974, B-159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn.. 572

SURPLUS PROPERTY (*See* PROPERTY, Public, Surplus)

TAXES
Contract matters. (*See* **CONTRACTS, Tax matters**)
Liens
Payments due contractors Page
Claims by workers underpaid under Contract Work Hours and Safety Standards Act and Service Contract Act would prevail over Internal Revenue Service (IRS) tax liens which matured subsequent to underpayments ---- 499
Personal income tax
Disability retired pay
Excluded from gross income for tax purposes
Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement ---- 740
TIMBER SALES
Contracts
Contractors
Allegations
Not substantiated by record
Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost a month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take ---- 459
Rights
"Election" or waiver
Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, contractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver of contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract ---- 459
Modification
Consideration
Adequacy
Contractor has alleged that modification agreement to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates lacked consideration since Forest Service could have allowed change without increasing rates. However, contractor received consideration of being relieved of more risky and costly logging method and being allowed to use equipment he apparently was more familiar with and had more control over ---- 459

TIMBER SALES—Continued
Contracts—Continued
Modification—Continued
Consistent with Forest Service manual Page

Forest Service action of modifying contract to change logging methods and raise stumpage rates is not inconsistent with Forest Service Manual. In any case, manual is merely expression of Forest Service policy, of which failure to adhere does not render action invalid---------- 459

Contract provision
Alternate logging methods

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging---------- 459

Not unconscionable under Uniform Commercial Code

Contract modification to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates is not unconscionable under Uniform Commercial Code Section 2–302, as contended by contractor, where contractor is experienced logger, record indicates that Forest Service apprised contractor of scope and nature of modification over a month prior to its execution and modification was lawful and not one-sided---------- 459

Rates
Structure
Agreement

Modification of rate structure of timber sale contract is in violation of 36 C.F.R. 221.16(a) (1976), which prohibits retroactive rate modifications, because modification pertains to contract unexecuted portions as well as executed portions. However, contractor, who signed modification agreement and performed contract in accordance therewith, cannot now assert violation to excuse himself from agreement---------- 459

TRANSPORTATION
Air carriers
Certificated *v.* noncertificated air carrier service
Additional per diem for delay in travel

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination---------- 629

Hours of travel

Where the only certificated air carrier service between points, both of which are outside United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavailable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified-- 629

TRANSPORTATION—Continued
Expedited service, (*See* TRANSPORTATION, Rates, Expedited service)
Household effects
Expedited service. (*See* TRANSPORTATION, Rates, Expedited service, Shipment of household effects)
Rates
Expedited service
Shipment of household effects
Liability Page

Employee is not liable for expedited service charges on shipment of household goods moved under actual expense method where bill of lading contract between Government and carrier did not conform to rules in governing tariff 757

Tariffs
Ambiguous
Ambiguity unfounded

No ambiguity is found in tariff when one tariff item clearly makes rates in tariff inapplicable on shipments having certain physical characteristics, and directs tariff user to another tariff for applicable rates on those shipments 529

Construction
Against carrier

A tariff should be construed strictly against the carrier who drafted it, but a tariff must be given a fair reading and any unreasonable ambiguities cannot be imparted 529

Waiver

Rules in a regulated common carrier tariff on file with regulatory commission are part of the tariff and cannot be waived 757

TRAVEL EXPENSES
Air travel
Fly America Act
Applicability

Where the only certificated air carrier service available between points in the United States and points outside the United States requires boarding or leaving the carrier between midnight and 6 a.m., or travel spanning those hours, the employee is required by 49 U.S.C. 1517 to use such service insofar as otherwise available under the Comptroller General's Guidelines of March 12, 1976, and decisions of this Office. 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified 629

Foreign air carriers
Prohibition
Availability of American carriers

Where the only certificated air carrier service between points, both of which are outside the United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavailable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified 629

TRAVEL EXPENSES—Continued
Failure to fullfill contract
Alaskan employees Page
Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination 606
Private parties
Attendants
Handicapped employees
Physically handicapped individual, confined to wheelchair, serving without compensation on Commerce Technical Advisory Board may be reimbursed for travel expenses of wife who accompanied him as attendant on official travel. Based on Federal Government's policy of nondiscrimination because of physical handicap set forth in 5 U.S.C. 7153 (1970) and 29 U.S.C. 791 (1975), where agency determines that handicapped employee, who is incapable of traveling alone, should perform official travel, travel expenses of escort are necessary expenses of travel 661
Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
VETERANS
Education
Overpayments
Educational assistance allowances to veterans
Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587
VETERANS ADMINISTRATION
Surplus/excess property
Sale/transfer
Disposition of proceeds
Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754
WAIVERS
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

WORDS AND PHRASES

Auction technique — Page

Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique ---- 712

Block grant funds

"Entitlement" block grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States ---- 645

Expedited service

Employee is not liable for expedited service charges on shipment of household goods moved under actual expense method where bill of lading contract between Government and carrier did not conform to rules in governing tariff ---- 757

Helicopter logging

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging ---- 459

Helitack mission formula

Mission-mile

Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended ---- 671

"High lead slack line" and tractor logging

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging ---- 459

WORDS AND PHRASES—Continued

Initial production testing Page

Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate 689

Interchange point on usually traveled route

Where the only certificated air carrier service between points, both of which are outside United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavilable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified 629

"Line"

"Taking area"

"Taking line"

As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83–776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B–142250, May 2, 1961, overruled 655

Parametric and other cost estimating techniques

Parametric and other cost estimating techniques may legitimately be used by agency to determine credibility of each offeror's production estimates and most probable cost to the Government 635

"Read protection"

"Storage protection"

Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided 694

"Two bites at the apple"

Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487

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